

PSYCHIATRY AND CRIMINAL RESPONSIBILITY IN ENGLAND, 1843-1939

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ABSTRACT

This thesis examines the response of English law to medical claims to expertise in relation to criminal responsibility, focusing mainly on the period 1883-1939 but also considering some aspects of the period 1843-82. It shows that between 1883 and c. 1907 a marked rapprochement occurred between legal and medical views of insanity, but that this gave way to a period of renewed conflict after c. 1908. The latter period nevertheless witnessed legal changes - the Mental Deficiency Act 1913, the Infanticide Acts 1922 and 1938, and the growth of psychiatric intervention in the magistrates' courts - which prefigured the wider legal reforms of the 1950s.

Three main explanations for the law's varying response to psychiatry are advanced. Firstly, it reflected changes in the role of lunacy specialists and prison doctors in pre-trial procedures. Secondly, the emerging consensus in the 1880s and 1890s was embodied in a new form of medico-legal discourse accessible to both professions, *but this common ground came under threat both from new medical and allied discourses (criminology, psychoanalysis and the discourse of mental deficiency) and from a resurgence of formalism in the criminal law.* Thirdly, changing perceptions of crime, combined with the cultural impact of the natural and social sciences, produced a climate where certain kinds of scientific explanation of criminal behaviour accorded well with the "common sense" of judges and juries.

The M'Naughtan Rules furnished a test of criminal responsibility which was doctrinally coherent and did not depend on the truth of any particular medical view of insanity, but they did not provide a generally acceptable criterion of who should be punished rather than treated, let alone of who should be sentenced to death. Consequently while the rules survived intact in legal doctrine they were undermined in practice by the decisions of juries, judges, magistrates and Home Secretaries. In the case of infanticide the law was changed to reflect commonsense perceptions (only indirectly related to medical theories) of the causes of women's violent acts.

PREFACE

This thesis is an historical study of the relationship between psychiatry and English criminal law, and especially the doctrine of criminal responsibility. It focuses on the period 1883-1939, but also discusses some aspects of the period 1843-82. It has three main objectives. Its primary aim is to contribute to historical knowledge by documenting a period of medico-legal history which has hitherto been studied in much less depth than the preceding and following periods. In particular, it reviews the extensive material of legal interest to be found in medical journals (the British Medical Journal, Lancet, Journal of Mental Science, Transactions of the Medico-Legal Society and Medico-Legal and Criminological Review) and in the Home Office files in the Public Record Office, Kew. Secondly, it offers a contribution to sociological discussions of the growth of expert knowledge, and its relationship to law. Thirdly, it aims to contribute to jurisprudential discussion of the insanity defence and related issues, through an analysis of the work of some important early theorists, and by offering an historical perspective on the modern law relating to criminal responsibility.

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ABBREVIATIONS

AC	Law Reports: Appeal Cases
BMA	British Medical Association
BMJ	British Medical Journal
CCA	Court of Criminal Appeal
CCC	Central Criminal Court
CJ	(after surname) Chief Justice
Cr.App.R.	Criminal Appeal Reports
DPP	Director of Public Prosecutions
J	(after surname) Mr Justice
JMS	Journal of Mental Science
KB	King's Bench reports
LJ	(after surname) Lord Justice
MPA	Medico-Psychological Association
NSPCC	National Society for the Prevention of Cruelty to Children
OBSP	Old Bailey Sessions Papers
PP	Parliamentary Papers
PRO	Public Records Office, Kew
St.Tr.N.S.	State Trials: New Series

CHAPTER 1

INTRODUCTION: "A MATTER OF SCIENCE"

Science is ever on the advance; and, no doubt, science of this kind, like every other, is in advance of the generality of mankind. It is a matter of science altogether; and we who have the ordinary duties of our several stations and the business of our respective avocations to occupy our full attention, cannot be so well informed upon it as those who have scientifically pursued the study and treatment of the disease [of madness]. I think, then, we shall be fully justified in turning to the doctrines of matured science rather than to the maxims put forth in times when neither knowledge, nor philanthropy, nor philosophy, nor common justice had their full operations in discussions of this nature.¹

In 1843, when Alexander Cockburn addressed the jury in these terms at the trial of Daniel McNaughtan,² such an appeal to scientific knowledge to determine the insanity of an alleged murderer - the assassin, in this case, of the prime minister's private secretary - was a relative novelty. Mediaeval English law had recognised madness as a ground, usually for a royal pardon, but sometimes for outright acquittal, which became the norm from the sixteenth century onwards (Hurnard 1969: 159-70; Hanawalt 1979: 147-8; Walker 1968: 25-41). Madness was not, however, a matter of expert diagnosis. In eighteenth-century trials, "John Bull as juryman had no great difficulty in distinguishing between anger and lunacy, malice and madness" (Porter 1990: 115).³ Credit for introducing the medical man⁴ as an expert on insanity into the criminal courts seems to be due to the aristocratic murderer Earl Ferrers, who when faced in 1760 with the difficult task of convincing his peers of his own insanity, called Dr Monro, the physician of Bethlem,

1. Alexander Cockburn QC in *R v M^cNaughton* (4 St. Tr. N.S. at 876; reprinted in West & Walk 1977: 34-5).

2. This appears to be the spelling preferred by the defendant himself (Moran, 1981). In the *State Trials* reports it is spelt "M^cNaughton". Clark and Finelly's Report of the subsequent House of Lords debate is entitled "Daniel M^cNaghten's case" (the printers used a reversed apostrophe for the superscript "c").

3. See Forbes (1985: 168-176) for some examples of lay determination of insanity in the 18th century. Forbes cites a witchcraft trial of 1602 as the earliest instance of "psychiatric" testimony, but the evidence related to the state of mind of the alleged victim, and to call it "psychiatric" is "a rather tendentious use of the term" (Eigen 1994: 169).

4. Women could not qualify as doctors in England until 1876. The first woman to obtain the alienists' (or as they started to call themselves in the early 20th century, psychiatrists') specialist qualification, the Certificate in Psychological Medicine, did so in 1888 (Mackenzie 1983).

to testify to the common signs of that condition. The defence failed and Ferrers was hanged (McLynn 1991: 150-1).

Cockburn quoted extensively from Thomas Erskine's celebrated speech in defence of James Hadfield in 1800. The expert evidence in that case probably added little to the impact of what the jurors could see for themselves: the membranes of Hadfield's brain, exposed to view by the sword-wounds in his skull. Hadfield's case was a landmark, however, because Erskine managed to convince the jury, and the Lord Chief Justice, that despite the prisoner's apparent premeditation and composure before and after he fired his pistol in the direction of George III, his mind was so overwhelmed by delusions that he had not "compassed and imagined" the King's death and thus was innocent of treason. After Hadfield's acquittal the transparency of madness was clouded, and defence counsel, who were establishing themselves as key participants in criminal trials (Langbein 1978, 1983), increasingly called on medical men to prove that "delusions" were the cause of their clients' behaviour (Eigen 1994). The success-rate of insanity defences in cases of personal violence markedly increased (Eigen 1985).

Cockburn's defence of McNaughtan was unprecedented, however, in the sheer number of expert witnesses - nine, of whom seven actually testified - and the weight which counsel sought to attach to their views, as well as those of the American alienist Isaac Ray, whose work he quoted at length in his speech. Cockburn's appeal to the jury was paradoxical. The jurors, representing the common citizenry, the "generality of mankind", were asked to accept that modern science had a view of insanity which was "in advance" of theirs. But how could the jury be competent to judge whether the new science was an advance on previously accepted understandings of madness, unless they had a sufficient share of the new knowledge to make a comparison? In a move that was to be a recurrent feature of psychiatry's struggle for recognition over the coming century, Cockburn relied on a rhetorical appeal to the faith which the early Victorian public had in "science" generally (Houghton 1957; Knight 1986; Joyce 1994). He portrayed "humanity and wisdom" as advancing "hand in hand, into the dreary abodes of these miserable beings" (the mad), where "whilst the one has poured the balm of consolation into the bosoms of the afflicted, the other has held the light of science over our hitherto imperfect knowledge of this dire disease, and taught us how, in gentleness and mercy, best to minister to the relief of the

unhappy sufferer!" (p. 877). "Gentleness and mercy" were qualities associated with the "moral treatment" applied in asylums following the example of such model institutions as the famous York Retreat (Digby 1985), which appeared immeasurably more humane (and were a far more subtle and effective means of control: Foucault 1967), than the chains and bleedings of 18th-century Bedlam (Porter 1990: 121-9; Scull 1993: 51-6). Moral treatment in fact owed little to medical science; but it was an article of faith for Victorian medicine "that science not only leads to progress, but virtually guarantees it" (Youngson 1979: 9).

Cockburn also relied on the simple fact that "The very nature of the disease necessitates the seclusion of those who are its victims from the rest of the world." The 1840s were a period of mass incarceration, not only of the mad but of criminals and the poor (Ignatieff 1978). In the new institutions, new forms of power generated new forms of expertise (Foucault 1977, Donnelly 1983) which those outside, cut off from the raw material on which the experts worked, could hardly challenge.

Cockburn's defence impressed Chief Justice Tindal and the two other judges who sat with him so much that they stopped the trial and virtually directed the jury to acquit McNaughtan. The verdict of "Not guilty by reason of insanity" aroused a "storm of protest...and a general denunciation of mad doctors" (Ballantine 1882: 246). Queen Victoria joined the chorus of disapproval⁵ and at so did at least two of the Law Lords who spoke in the House of Lords' debate on the issue.⁶ Lord Brougham objected to medical men being transferred "from the witness-box to the jury-box". "The impression on the public mind", complained Lord Campbell, "was, that if a certain number of medical witnesses, generally called mad doctors, had come into court and said that the prisoner was insane when he committed the act, the trial was to be stopped - cadit questio....The public had been inundated with medical books calculated very much to mislead juries" (Moran 1981: 165-6).

In response to these anxieties the twelve common-law judges were summoned to appear

5. See her letter to Sir Robert Peel (allegedly McNaughtan's intended victim) quoted by Walker (1968: 188).

6. The only peers who spoke were the four Law Lords - Lords Lyndhurst LC, Brougham, Campbell and Cottingham - who conducted most of the appellate work of the House of Lords in the 1840s, and who "gave the House for the first time a reputation as a serious court of law" (Stevens, 1979: 30, n. 131; see also 37-8, n.1).

before the House of Lords and answer five questions on the law, a procedure which was common enough when the Lords were hearing a case on appeal,⁷ but most unusual when the issues had been raised before the house in political debate. The answers which Tindal CJ - whose conduct of the trial had been so much criticised - gave on behalf of eleven of the judges (the twelfth, Maule J, dissented because of his objections to the Lords' procedure) will be examined in detail in Chapter 2. They reasserted a purely legal definition of insanity, well grounded in precedent and principle and quite independent of any medical doctrine beyond the broad assumption that madness was a "disease of the mind". The central part of this definition, and what is usually referred to today as "the M'Naughten rules", is that,

to establish a defence on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong.

The M'Naughten Rules and the law today

The above passage from the judges' opinion still defines the insanity defence in English law, and is the basis of the law in Australia, Canada, New Zealand, the Irish Republic (McAuley 1993,). The "M'Naughten test" has also been extremely influential in many jurisdictions in the United States, where there has been a movement to return to a strict definition of legal insanity (Mackay 1995: 108-23).

An equally durable definition was that laid down in Pritchard (1836) of unfitness to plead (also called insanity on arraignment), the degree of insanity or defective understanding that makes it impossible for a prisoner to stand trial. Alderson B. told the jury that they must decide whether the defendant, a deaf mute charged with bestiality, was "of sufficient intellect to comprehend the course of proceedings of the trial, so as to make a proper defence - to know that he may challenge any of you to whom he might object - and to comprehend the details of the evidence, which in a case of this nature must constitute a minute investigation." This, too, remains

7. As in the politically important case of O'Connell (1843-4) a few months later. See Veeder (1907) for a discussion of this procedure.

authoritative in English law today.

As a result of legislation hastily introduced after the acquittal of Hadfield, a finding of either insanity or unfitness to plead, whatever the charge, resulted in detention "at Her Majesty's pleasure" which usually (though by no means always: see Chs. 3 and 5) meant for life. This remained the law until 1992.⁸

Over the century and a half since they were promulgated the M'Naughtan rules have been repeatedly criticised for ignoring the "advances of science". A recent textbook restates the standard objection as follows:

The enormous advance in medical science in the last 150 years makes a powerful case for re-examining the M'Naghten Rules. They refer only to mental disorders which affect the cognitive faculties, i.e. knowledge of what one is doing, or of its wrongness, whereas some forms of mental disorder impair practical reasoning and the power of control over actions.

(Ashworth 1995: 206-7.)

Such criticism has failed to secure any amendment in the M'Naughtan Rules themselves, but the practical significance of the controversy over the rules has been much reduced, partly by flexible interpretation on the part of trial judges (see Chs. 3 and 5), and partly by a series of legislative reforms. The most important reforms in the period of this study were the Mental Deficiency Act 1913 and the Infanticide Acts of 1922 and 1938. The former allowed courts, in cases of mental deficiency, to disregard the issue of responsibility in deciding whether to send an offender to hospital or to prison (see Ch. 4). The latter created a special defence to murder where a mother kills her baby while the balance of her mind is disturbed as a result of its birth (see Ch. 7). Whereas for murder the mandatory sentence was death (and is now life imprisonment), infanticide was made a non-capital offence for which the sentence was at the discretion of the judge. (It remains a separate offence and nowadays nearly always attracts a non-custodial sentence: Mackay 1993.) These two mechanisms for avoiding medico-legal conflict - by conviction for a lesser offence or by committal of the formally responsible to hospital - were extended much more widely by the Homicide Act 1957, which made possible the verdict of manslaughter on the

8. Criminal Lunatics Act, 39 & 40 Geo. III c. 94, discussed by Moran (1985); Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (in force 1992).

grounds of diminished responsibility, and by the Mental Health Act 1959, which gave courts the power in all cases except murder to send a convicted offender to hospital. As a result of these changes, the verdict of "guilty but insane" (or, after 1964, "not guilty by reason of insanity")⁹ and the finding of unfitness to plead¹⁰ have become so rare as to be almost insignificant. Recently, however, the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 introduced a new, flexible system of disposals, along with a "trial of the facts" for those found unfit to plead. Although the impact of the Act to date has not been spectacular (Mackay and Kearns 1994),¹¹ in the longer term it "could herald a major shift in restoring the [insanity] defence to practical importance" (Mackay 1995: 73). It therefore appears timely to re-examine the use of the defence in its heyday.

McNaughtan's case and the sociology of law and psychiatry

The main focus of this thesis will be on a period between 40 and 100 years after McNaughtan's trial, but it is worth pausing a while longer over this already well-documented case, since it illustrates a number of sociological themes which have been discussed in the rich historical literature on the early development of English and French psychiatry and which will be explored further in the following chapters. A discussion of the wider context of the case can therefore serve both as a review of the relevant literature and an introduction to the main arguments of the present thesis.

Power, knowledge and discipline

In Cockburn's speech, the mad-doctors' claim to scientific knowledge was linked directly to their control over the disciplinary institutions where the mad were confined. It was not the medical psychologists' scientific knowledge of madness which enabled them to run asylums, but

9. Criminal Procedure (Insanity) Act 1964, s. 1

10. The decline of unfitness to plead may also reflect the use of neuroleptic drugs to curb florid psychoses (Walker 1968).

11. Since this research was published there appears to have been a gradual increase in the use of the Act, but also a disappointing reluctance of judges to use the new non-custodial disposals (Mackay, personal communication).

their running of asylums which enabled them to gain a scientific knowledge of madness (Foucault 1967, 1977; Donnelly 1983). As Eigen puts it in his recent study of insanity trials in the period leading up to McNaughtan:

The institutionalization of social deviants in the early to mid-nineteenth century appears in retrospect to have been a precondition for the rise of the "corrective" human sciences. Criminology, penology, and certainly psychiatry could hardly be envisioned in their modern-day incarnations had it not been for a captive population and the opportunities such a setting provided to examine and classify. In terms of mental medicine, never before had there converged a confined community and a generation of keepers eager to delineate distinct classifications and categories of derangement.

(Eigen 1995: 130-1)

The Boundaries of Expertise

The keepers' eagerness to classify their charges was prompted, in large part, by their desire to win recognition for themselves as experts on madness. While Scull (1993: 206-12) gives the impression of a somewhat cynical bid to blind the lay public with science, Eigen (1995: 113) suggests that "In part, the rapid development of a corpus of writing in medical jurisprudence appears to have been a defensive move sparked by the professional humiliation forensic witnesses faced at the hands of an advocacy bar." Whatever the motives of individuals, the interaction of law and medicine gave rise to a new "discursive formation" (Foucault 1974) which delineated simultaneously a range of objects (varieties of lunacy, lunatics and criminals) and a range of privileged speakers and institutional sites by whom and from which valid statements about those objects could be made.

If alienism or medical psychology was to constitute an autonomous profession or discipline, it needed to claim not only the right to make authoritative statements within a certain domain, but the right to define the boundaries of that domain (Bauman 1992: 71) - the right not only to classify mental diseases, but to determine who was diseased and who was not (Freidson 1972: 339-45). From the point of view of the lay public - represented in McNaughtan's case by the jury - such a claim presents a bewildering paradox: they are asked to judge that only the statements of experts are valid within a given domain, but in the very act of making such a judgment they must renounce their right to judge, since only the experts are competent to deter-

mine the validity and limits of their own expertise. From the point of view of other professions - in this case law - such a claim constitutes a threat to their own boundary-drawing capacity. In McNaughtan's case the judges emphatically reasserted the right to define the boundary between the responsible legal subject and the irresponsible lunatic in terms of the increasingly rigorous, systematic and precise legal discourse which was developing at the time (see below: 17-23).

"Boundary disputes" have been a constant feature of the development of the professions in general (Abbott 1988) and of relations between law and psychiatry in particular (Goldstein 1987). Such disputes should not, however, be seen as simple competitive struggles over "turf" (cf. Conrad and Schneider 1980; Abbott 1988: 102). Asylum superintendents were not necessarily anxious to sweep as many deviants as possible into the institutions they controlled (Saunders 1985, 1988; cf. Jacyna 1982). From an economic point of view, the interests of professionals administering a publicly funded service often lie in restricting the range of problems with which they are called upon to deal. The interests of professionals in prosperity, social status and a quiet life certainly have a bearing on jurisdictional disputes, but so does the deeper interest of each profession in maintaining the cognitive authority of its particular form of knowledge (Smith 1981: 9).

"The simplest way to distinguish medical and legal discourse is to say that the former is determinist and the latter is voluntarist" (*ibid*: 10). But as Smith's own analysis shows, and as Hughes (1986), Harris (1989) and Guarnieri (1991) have argued in studies of American, French and Italian legal medicine respectively, the nature of the relationship is more complex than such a straightforward distinction might suggest. Voluntarism played a very significant part in (especially) Victorian medical discourse (Clark 1988; below, Ch. 2), and determinism was equally important in legal discourse, and particularly in utilitarian jurisprudence. The reason why utilitarian lawyers (e.g. Lord Brougham: see Ch. 2) wanted to treat people like McNaughtan as being legally responsible was a belief about the causal effects of the threat of punishment on behaviour, not a metaphysical claim about McNaughtan's free will. The conflict between law and medicine was not a philosophical argument over free will, but a series of disputes over whether particular events should be narrated in causal or voluntaristic terms (Smith 1985).

Why law needs medicine

The McNaughtan case might seem to epitomise the conflict between law and psychiatry, and yet it was a lawyer - Cockburn - who made such bold claims on behalf of medical expertise, claims which the three judges presiding at the trial seemed happy to accept. As Eigen (1994, 1995) has argued, the role of defence counsel within the adversarial system was crucial in promoting the importance of medical witnesses and even in shaping the nature of medical descriptions of madness (for example the importance attached to delusions). In the later development of medico-legal relations the role of the prosecution lawyers was equally significant, as we shall see (Chs. 3 and 5). Similarly, in the inquisitorial French system of justice, medical men did not intrude into the courtroom but were invited in - though by the judges rather than by advocates (Nye 1984, Foucault 1988, Harris 1989).

As Castel (1988) argues in the French context, psychiatry entered the courtroom as a necessary complement to the legalistic model of clearly defined rules laid down for the guidance of autonomous, rational subjects. In seventeenth and eighteenth century England the courts' decisions as to who should be regarded as mad and whether they should be freed or confined were relatively untrammelled by clear-cut rules. The insane, even if they had killed, might be discharged to the care of relatives, or sent back to jail "for the safety of the King's subjects" (Beattie 1986: 84). In Hadfield's case (1800), the defence called for an acquittal on the basis of a strict analysis of the mens rea of treason, and the court found itself embarrassed by the lack of a clear statutory authority for the defendant's detention. The law needed medicine both to supply the detailed knowledge of mental states required for fine judgments as to mens rea, and to legitimise and administer the detention of those who could neither be convicted of crime nor *safely* allowed their liberty. It was precisely the features of legalism which led to conflict with psychiatry - the need for a clear division between the responsible and the irresponsible, and for the avoidance of apparently arbitrary powers of detention - which made psychiatry an indispensable, but dangerous, supplement to law.¹²

12. For an application of Castel's analysis to English civil mental health law see Unsworth (1987, 1993). The idea of the "dangerous supplement" - that which is "outside" legal discourse but has to be added in order to supply some missing element, threatening to destabilise the law's "internal" logic - comes from Derrida (1976) via Fitzpatrick (1991).

The cultural and structural context

The determination of the judges who drew up the McNaughtan rules to lay down a rigorous definition of responsibility was part of a wider movement to clarify and formalize the criminal law, which laid the foundations of a body of doctrine which still endures (Hostettler 1992; Norrie 1993). As Wiener (1990) argues, this reform of the criminal law drew upon a "discourse of character" which also inspired the disciplinary regime of the early Victorian prison system. By holding men (and to a lesser extent women) "sternly and unblinkingly, responsible for the consequences of their actions" (*ibid.*: 55) it was hoped that they would be encouraged to act as rational, responsible, self-controlled individuals - the sort of people who would abide by their contractual obligations and by the discipline of the workplace, and live in crowded cities without producing social chaos. In the reformed lunatic asylums, "moral treatment" shared the objective of producing responsible individuals (Foucault 1967; Digby 1985). The new forms of social discipline required by the industrial revolution drew on two seemingly contradictory ideologies, religious moralism and a belief in the scientific calculability and predictability of human behaviour (Ignatieff 1978).

In the McNaughtan case the "discourse of character" came into sharp conflict with the claims of the human sciences. "Medical claims about lunacy", as Smith (1981: 9) points out, "were a small part of a much wider campaign by social reformers to base social policy on facts." Wiener (1990) describes how (among other factors) the cultural impact of the sciences - natural as well as social - undermined the "discourse of character":¹³

As technology and economic advances kept extending the scale and complexity of life, and as the natural sciences put forth new deterministic models of understanding the human world, the Victorian image of the individual weakened.... At the same time that upper-middle-class individuals began to feel less autonomous and less vital, they began to perceive criminal offenders as less threatening and less

13. See also Houghton's (1957) classic discussion of the impact of science on Victorian culture, and Hilton's (1988) analysis of the impact of such discoveries as the theory of evolution and the law of the conservation of energy on the Evangelical world-view. But cf. Joyce (1994), who argues that in the early Victorian period the "romance of science" supported rather than undermined the "language of character" as it enhanced the perceived possibility of rational self-improvement.

responsible for their behaviour and instead saw them as social wreckage and stepchildren of nature, rather than wilful enemies of society.

(ibid: 12.)

Wiener is open to criticism (Garland 1991; Weiss 1992) both for overstating the extent of this cultural change and for understating the importance of its structural determinants - particularly the economic factors which widened the division between the "respectable working class" who learned the Victorian lesson of prudence and self-discipline, and the "residuum" whose stubborn deviance came to be attributed to an innate weakness of will (Davis 1980; Stedman Jones 1984; Garland 1990). Between the early Victorian period discussed by Smith (1981) and the late Victorian and Edwardian periods discussed below (Chs. 2-4) a significant change in the intellectual climate undoubtedly occurred, which was reflected in a less acrimonious medico-legal debate, in the attitudes of lay juries and in a more generous use of the prerogative of mercy (Chadwick 1992). On the other hand, early Victorian concerns with deterrence, character-formation and the punishment of the wilfully evil did not fade away, but remained influential throughout the period of this study.

The politics of insanity

Daniel McNaughtan's crime was, on the face of it, a political assassination perpetrated at a time of acute economic crisis (the "hungry forties") and political unrest (the Chartist agitation). Quen's (1968) study of the case locates it in that context, arguing that the "liberal interpretations of the law" in Hadfield (1800) and Oxford (1840) cases were discarded in favour of the "regressive and simplistic" McNaughtan rules (Quen 1983: 163) because the case became a focus for public and political fears of violence and disorder.¹⁴ Moran (1981) advances a case that is in some ways the exact opposite of Quen's. The "desperate political realities of early Victorian England" (p. 114), might well, he suggests, have led a Chartist sympathiser such as McNaughtan to see the assassination of prime minister Peel - who was, Moran accepts, the real target - as a justifiable political act. If Moran rather understates the strength of the medical evidence (which

14. For a case-study of a 19th century American trial where the political reaction to the president's assassination clearly militated against an insanity verdict see Rosenberg (1968).

reads like a modern clinical portrait of a paranoid schizophrenic: see Rollin 1977), this is not fatal to his central argument:

From a sociological standpoint, whether McNaughtan was persecuted or paranoid is not crucial. What is important is the relationship between his crime and the political and historical forces to which he responded....The Court's verdict of insanity undercut the rationality and legitimacy of McNaughtan's case and at the same time effectively eliminated him from British society by confining him ... for the rest of his life. A guilty verdict, which would undoubtedly have been accompanied by a public hanging, might have risked elevating McNaughtan to martyrdom, thereby encouraging, rather than calming, political protest in Britain.

(Moran 1981: 5-6)

The same anxiety about creating a martyr was evident when Bellingham, the assassin of prime minister Perceval, was hanged in 1812 despite evidence of his insanity. The government was so worried about the possible reaction that 5,000 troops were held in readiness and additional reinforcements marched towards London (Gatrell 1994: 98). Later, when Sir Roger Casement (the British diplomat and would-be Irish rebel leader) was sentenced to death in 1916, Prime Minister Asquith wrote that "Several members of the cabinet ... were strongly of opinion that it would be better (if possible) that he should be kept in confinement as a criminal lunatic than that he should be ... canonized as a martyr", but the psychiatrists who examined him found he was not certifiably insane (Jenkins 1978: 430).¹⁵ Moran (1985, 1986) has applied a similar analysis to the politically convenient verdicts of insanity on two other would-be assassins, James Hadfield (1800; see also McCalman 1993) and Edward Oxford (1840), and it could easily be extended to the trial of Roderick Maclean for shooting at Queen Victoria in 1882, where the Attorney-General told the jury that if they acquitted him "satisfaction would be felt by every subject of the Queen that it was not from the ranks of those who were sane that a hand had been raised against our gracious sovereign" (Times 24 March 1882: 11). The classic twentieth century example of the psychiatric depoliticization of treason is that of the American poet Ezra Pound, found incompetent to stand trial for broadcasting Italian propaganda in World War II (Cornell 1966, Torrey

15. Insanity was not pleaded at Casement's trial, despite the alleged efforts of F.E. Smith, the Attorney-General, to persuade defence counsel to raise the plea and support it with Casement's homosexually explicit diary. See Sullivan (1952, Ch. 29); Heuston (1964: 374-8); Campbell (1983: 402-22).

1984).

Although Moran's work is confined to overtly political crimes, the critique of psychiatry which sees it as invalidating what would otherwise appear as plausible motives for deviant conduct has a much more general application (Ingleby 1982), and is particularly relevant to the "politics of the family" (Laing 1976).¹⁶ Most of the cases which will be discussed in subsequent chapters were about people who acted violently against those they were supposed to love: wives, children, sweethearts. Such acts, as Smith (1981: 29, 149) points out, had "other meanings" besides medical ones.¹⁷ Norrie (1993: 187-194) develops this point further, to argue that "law's decontextualization strategy works" in collaboration with medicine, to hide "the social significance of madness" (p. 187, Norrie's emphasis): for example the part played by misogyny in sexual murder and by poverty in infanticide.

It is one thing to point out, as Smith does, that defining an act in psychiatric terms distracts attention from other meanings, and another thing to portray this as a function or "strategy" of the law which explains why it is as it is. But the case of infanticide (Ch. 7), in particular, does strikingly illustrate both the resistance of the law to taking account of the social or emotional context of crime, and the way in which the strength of that resistance varies according to the gender of the defendant.

Conclusion

This chapter has reviewed a number of sociological perspectives on the changing relationship between criminal law and psychiatry, each of which has something to contribute to an understanding of the phenomenon. As Garland (1990) has argued in the context of the sociology of punishment, the problem with many existing studies is that they each adopt a perspective which powerfully illuminates one aspect of their subject-matter whilst obscuring or neglecting others. For example, Foucault's studies brilliantly analyse the relations between disciplinary power and the human sciences but have been justly criticized for neglecting the symbolic and cultural

16. For a vivid case-study - which, however, rather glosses over the murderer's fanatical misogyny - see Foucault (ed., 1978).

17. See Harris (1989) for an excellent study of the competing meanings of "crimes of passion".

dimensions of punishment, and particularly the continuing significance of capital punishment long after the birth of the modern prison (Spierenburg 1984, Garland 1990): a neglect which fatally weakens his account of the emergence of the psychiatric expert in criminal trials (Foucault 1988). Smith (1981) has provided the definitive account of the relationship between medical and legal discourses in the early Victorian debate over criminal responsibility but his study does not deal with "the question of power and its distribution" (*ibid*: 7), and has been criticized by Wiener (1990: 84 n. 139) for overlooking the extent to which law and medicine shared a common concern with "character-formation." In turn, Wiener's analysis certainly shows an appreciation of the cultural significance of punishment, but focuses so restrictively on this level of explanation that it "approaches cultural reductionism" (Weiss 1992).

A fully rounded account of medico-legal history must take into account all the three levels of explanation exemplified by these three different studies: the institutional level, at which medical and legal knowledges take shape in the context of specific penal, therapeutic and legal practices; the discursive level, at which medical and legal discourses develop and interact, and professions defend their interests in their respective kinds of knowledge; and the cultural level, at which those specialist discourses can be seen as part of a wider set of perceptions, debates and practices concerning crime, deviance, responsibility, gender and other fundamental social issues, which in turn reflect conflicts and changes in the economic and political structure of a society. The danger in attempting to combine all these different levels or perspectives is, as Garland (1990: 279) acknowledges, that of drifting into an "arbitrary eclecticism". To avoid this, it is worth re-emphasising, perhaps more forcefully than Garland does, Foucault's fundamental insight into the importance of the "disciplinary" institutions - prisons, schools, workhouses, factories, asylums - as defining features of modernity. It was the existence of these institutions which made possible the emergence of the scientific expert on human behaviour, the interplay between scientific and legal discourses, and the emergence of new categories of human being - the born criminal, the mental defective, the juvenile delinquent - as objects of "common sense" social discourse as well as specialist knowledge (Leps 1992). In short, it was disciplinary power which made possible the expert discourses and cultural changes with which we are concerned, though it did not directly or exclusively determine their content (see especially Ch. 4 below). To that

extent, this study, though it does not adopt Foucault's "genealogical" method,¹⁸ remains within what may broadly be termed a Foucauldian perspective.

In the chapters which follow I aim to fill the gap in historical knowledge between the periods covered in depth by Eigen's (1995) and Smith's (1981) researches and the well-known legal reforms and debates of the post-war period. The main focus will be on the period 1883-1939. I have taken the year 1883 as a starting-point for detailed research from primary sources because it witnessed two significant events in the development of the criminal law: the Trial of Lunatics Act which introduced the "Guilty But Insane" verdict in place of "Not Guilty by Reason of Insanity"; and the publication of J.F. Stephen's seminal discussion of madness and crime in his History of the Criminal Law of England. I shall, however, go back beyond 1883 in exploring the theoretical debates about law and insanity (Ch. 2) - especially in order to show how the orthodox legal definition of insanity coheres with the assumptions of Austinian jurisprudence - and in tracing the origins of the Infanticide Acts (Ch. 7). The year 1939 is an obvious historical landmark, and is notable in medico-legal history for the publication of the Home Office report on The Psychological Treatment of Crime (East and Hubert 1939). Chapters 2 and 3 end, and Chapters 5 and 6 begin, in or about 1908, a year notable for the first hearings in the Court of Criminal Appeal and for the report of the Royal Commission on the Care and Control of the Feeble Minded. Chapter 4, developing the insights of Rose (1985), Garland (1985), Watson (1988) and other scholars, examines one of the main sources of change spanning these two periods, the development of new forms of knowledge about crime and mental abnormality. Chapter 7 examines the very important gender divisions in this area of law and practice, with particular reference to the crime of infanticide. The concluding chapter will consider the implications of this and other historical research for an understanding of present-day debates about expertise and criminal responsibility.

This study is confined almost exclusively to England, apart from a handful of cases tried

18. As I understand this notoriously ambiguous term, a "genealogy" is a deliberately selective historical account which aims not at an understanding of the past for its own sake but at tracing - often among seemingly insignificant or contingent events - the origins of present-day practices and debates. Such a selective approach is always open to criticism for neglecting important dimensions of the past, though such criticisms arguably miss the point of Foucault's project. See Donnelly (1986), Castel (1994).

by English judges at assize courts in Wales. There will be occasional references to Scotland - where the law on criminal insanity diverged very significantly from that of England and Wales - and to other jurisdictions, but any systematic comparison of these very different legal systems would require a thesis in itself.¹⁹

19. A large part of the thesis by Lownie (1988) is devoted to a comparative study of the Scottish and English law, but much comparative work remains to be done (see Smith 1988).

CHAPTER 2

INSANITY AND RESPONSIBILITY: THE THEORETICAL DEBATE, 1843-1907

Insanity, according to Fletcher (1978: 835) "is the question on which common-law criminal theory has come into its own". English criminal law theory in the nineteenth century, and much of the twentieth, was dominated by the work of John Austin, the Criminal Law Commissioners (of whom Austin, for a brief period, was one) and Sir James Fitzjames Stephen. Important contributions to the debate over the legal definition of insanity were also made by medical writers, most notably Henry Maudsley and Charles Mercier. These legal and medical theorists established the key positions in a debate which has continued (often at a much less impressive intellectual level than theirs) ever since. By examining their writings on the insanity defence in some detail, we can see how a central part of English criminal jurisprudence was shaped by the social changes and ideological assumptions of the nineteenth century.

Austinian jurisprudence and the McNaughtan Rules

The second quarter of the nineteenth century was a formative period in English criminal law (Norrie 1993, Ch. 2). In the years following the Reform Act of 1832 and the resultant growth of middle-class Parliamentary power, the number of hangings dramatically decreased, and most of capital statutes comprising the "bloody code" were repealed in 1837 (Gatrell 1994: 9). The criminal law began to change in the direction advocated by the enlightenment reformers, emphasising proportionality, economical deterrence and legal certainty. The reformers' hopes of rationalising the criminal law through codification were thwarted (Hostettler 1992); but the general principles articulated in the reports of the two Commissions set up for this purpose reflected those which were emerging as judicial decision-making systematized the common law.

The criminal law addressed itself to a rational, calculating self-disciplined subject (Norrie 1993: 23): one who could subordinate his or her immediate desires to long-term calculations of utility. And if many of the people (working-class men in particular) to whom the law was addressed did not really resemble such subjects, then the law would do its utmost to teach them

self-discipline, both through the inflexible definitions of responsibility upheld by the courts (Wiener 1990) and through a range of disciplinary institutions including the workhouse, the prison and - for the most intractably irrational - the lunatic asylum (Foucault 1977; Ignatieff 1978; Scull 1993).

The dominant ideologies of the time, utilitarianism and Evangelicism, could join forces, despite their very different philosophical assumptions, around these disciplinary projects and around a shared "discourse of character" (Ignatieff 1978; Wiener 1990). In the works of Jeremy Bentham and John Austin, utilitarianism was combined with legal positivism, an approach to jurisprudence which embraced the enlightenment goal of rationalising the law while firmly rejecting the dangerous ideas of natural rights associated with the French and American revolutions. The distinction between fact and value was central to the new science of jurisprudence, as it was in the natural sciences (Harding 1986; Jones 1994): a politically safe science must eschew extravagant metaphysical speculations and confine itself to a patient study of the facts (Knight 1986: 16). The combination of legal positivism with this Baconian conception of science was to exert a lasting influence on relations between psychiatry and law.

Utilitarian penal theory was based on the *notion of economical deterrence*: the law must threaten, and inflict, as much pain as was necessary to induce rational individuals to calculate that breaking it was not to their advantage, and no more. From this postulate Jeremy Bentham derived a rationale for the insanity defence: because the insane could not understand the law's threats, punishing them was an uneconomical and unjustified infliction of suffering (Bentham 1907 [1823] Ch. XIII). As H.L.A. Hart (1968: 19) points out, Bentham's argument was "a spectacular non-sequitur": even if threatening the insane could not deter them, their punishment might help to deter others who would otherwise hope to escape by a spurious plea of insanity. Contrary, however, to the impression given by Hart, Bentham's rationale for the insanity defence was not the only one available to Victorian jurists. A related, but nevertheless distinct, argument was developed by his disciple John Austin.

Simply stated, Austin's argument is that legal guilt is synonymous with disobedience to law, i.e. to a command of the sovereign backed by the threat of a sanction (Austin 1885: 458-9). To disobey a command, one must know what is commanded and also know that one's act is of

the type which is prohibited. Thus, to disobey the law requires a capacity to understand the law and to perform the simple logical operation of "subsuming" one's act under the relevant law by constructing a syllogism on the following lines: The law prohibits theft; the act I am contemplating would amount to theft; therefore the law prohibits the act which I am contemplating (*ibid*: 490).

A problem with the definition of crime as disobedience to law is that it seems to imply that ignorance of the law should be an excuse, at least where (as Austin accepted was often the case, *ibid*: 653) the law is unintelligible to the common person. Austin rejected this view on utilitarian grounds; to allow mistake of law as a defence would create insuperable difficulties for the administration of justice, therefore knowledge of the law must be presumed (*ibid*: 489). However, an insane individual, even if presumed to know the law, might be mistaken as to the nature of a particular action or have insufficient powers of reasoning to subsume it under the legal rule. We shall see when we examine the judges' reasoning in McNaughtan's case how closely their reconciliation of the presumption of knowledge of law with the insanity defence resembled Austin's.

Austin was one of the Commissioners appointed in 1833 to consider the codification of the criminal law; and despite his early resignation, there is little doubt that his ideas exerted a lasting influence on his fellow Commissioners (Lobban 1991: 205). Otherwise Austin's work made little impact during his lifetime but became extremely influential after his death (Sugarman 1991), and remained so throughout the period covered by this study: indeed many of his assumptions and are still embedded in orthodox criminal law scholarship today (Stannard 1990).

The Criminal Law Commissioners published their Seventh Report (1843), including a draft criminal code, in the very week that the House of Lords debated McNaughtan's acquittal.¹ The report argues that the deterrent objective of the criminal law "supposes that the party to be influenced by the penal law possesses the power of electing to abstain from what is forbidden rather than suffer the consequences of offending." This could be taken as a justification for an "irresistible impulse" defence (i.e. that the accused knew the act was forbidden but could not

1. McNaughtan's trial came just too late to be considered by the commissioners (Hostettler 1983: 497).

"elect to abstain"), but the Commission deduces from it only that the justification for punishment has "no operation where a party, from want of understanding or disease of mind, is unconscious either of what he does or that what he does is wrong and cannot therefore so elect."

In discussing the insanity defence, the report meets directly the objection later raised by Hart, that by not threatening the insane the law may weaken its deterrent effect on the sane: "It is, no doubt, far from improbable that one not entitled to exemption may do wrong under the hope of sheltering under this plea". It argues, however, that "preventing the escape of the guilty ... could supply no justification for condemning those who were really innocent" and in case "so barbarous a law could not be enforced". This argument is best understood as an application of Austin's brand of rule-utilitarianism, rather than a simple "economy of threats". The insane are "really innocent" and their punishment would be "barbarous" because they have not elected to disobey the sovereign's commands. They have therefore not committed anything which can properly be called a "crime", and they fall outside the scope of the ethical rule that those who disobey the law should be punished.

The Commissioners' proposed wording of the insanity defence looks very much like the McNaughtan rules:

No person shall be criminally liable for any act who, at the time of such act, by reason of any disease, disorder or delusion of mind, or of weakness or unripeness of understanding, is either unconscious of what he does, or unable to discern that what he does is wrong, and, therefore, knows not that he offends against the laws of God, or man. The same rule shall apply to an omission.

(Draft Code, Of Incapacity, Article 1.)

There is no evidence that the Commission's report directly influenced the judges in preparing their answers to the House of Lords. It would be surprising if none of them had read the report, and equally surprising if they acknowledged getting any help from it, given the general hostility of the judiciary to the whole enterprise of codification (Hostettler 1992). It is more likely that both the Commissioners and the judges took account of the same precedents: e.g. Bellingham (1812), Bowler (1812) and Oxford (1840). The influences of utilitarianism and positivism can, however, be clearly seen in the speech of the leading Benthamite law reformer, Lord Brougham, in the House of Lords debate. Unlike the Commissioners, Brougham would

have no truck with the "law of God". "Accountability in its moral sense" should not, he insisted, be mixed up with accountability to law, "the only kind of accountableness with which they, as human legislators had to do....Man punished crime for the purpose of practically deterring others....It was in that sense only that he [man] had anything to do with the doctrine of accountable and not accountable." (Moran 1981: 158). The judges should make it clear when they talked of distinguishing right from wrong that they used the phrase "with reference to the commands of the law. They could know only one kind of right and wrong; the right is when you act according to the law, and the wrong is when you break it" (*ibid*: 160.)

The judges' answers can be seen as a very skillful attempt to meet the objections of Brougham and other critics without explicitly conceding that McNaughtan's acquittal had been erroneous. In answer to two questions dealing with the effect of insane delusions on criminal responsibility, the judges made it clear that a person "suffering from partial delusions only, but not otherwise insane", would be liable "if he knew at the time ... that he was acting contrary to ... the law of the land". Such a person "should be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." These answers neatly avoided an unequivocal implication that McNaughtan was guilty, since it was doubtful whether McNaughtan was a person "labouring under partial delusions only". Dr Monro, a key medical witness, had accepted that there were persons who despite their delusions retained a normal perception of right and wrong; but he made it clear that McNaughtan was not one of them (West and Walk 1977: 69-70).

In answering the question how juries should be directed in cases where insanity was pleaded, the judges declined to endorse Lord Brougham's view that the jury should be told that "wrong" meant "contrary to law": not because they favoured a broader definition of wrong, but because such a direction

might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable.

Brougham's "legal wrong" test was rejected, then, not on the ground that it was too harsh, but because it might be interpreted by juries in a way that was not harsh enough. Despite the persistent efforts of legal scholars (McAuley (1993: 31) is a recent example) to argue that "ought not to do" refers to morality rather than law, the only reading which is consistent with the judges' other answers is that it means "had an obligation (whether legal or moral) not to do". Either legal or moral awareness suffices for conviction: it does not follow that lack of moral awareness suffices for acquittal (see Williams 1961: 493-4). The defendant must, however, be aware of the "difference between right and wrong....in respect to the very act with which he is charged", rather than merely "in the abstract".

Applying this test to McNaughtan, it would seem that he was rightly acquitted if he fell within the category of lunatics described in a passage from Isaac Ray's Medical Jurisprudence which Cockburn quoted in his opening statement (West and Walk 1977: 45):

Their abstract conceptions of crime, not being perverted by the influence of disease, present its hideous outlines as strongly defined as ever they were in the healthiest condition....The particular criminal act, however, becomes divorced in their minds from its relations to crime in the abstract....[T]heir insanity [consists]... in being unable to discern the essential identity of nature between a particular crime and all other crimes, whereby they are led to approve what, in general terms, they have already *condemned*.

Such a person would have a knowledge of right and wrong "in the abstract" but not in reference to the particular act charged, and being unable to perceive its moral wrongness might also be unable (in Austin's terminology) to "subsume" it under the legal definition of crime. Moreover he would be "otherwise insane" apart from his "partial delusions", and therefore the other two apparently damning answers would not apply to him.

A second group of Commissioners on Criminal Law, appointed in 1845 to revise the code proposed by their predecessors (Hostettler 1992: 192-4), took up the question of moral or legal wrong in their second report, published in 1846. The majority took the view that any reference to the "law of God" would render the law excessively uncertain, and the test should be whether the defendant "by reason of unripeness or weakness of mind, or of any unsoundness of mind, wants the capacity, which the law otherwise presumes every person to possess, of discerning that such act or omission is contrary to the law of the land". Thomas Starkie, who had been one of the

original Commissioners, dissented on the ground that proof that the defendant knew the act was morally wrong was sufficient to show that he was capable of understanding that it was legally wrong. He did not consider the possibility that a defendant might know an act to be legally wrong but think it morally right. Both sides claimed that their views were consistent with the McNaughtan answers.

A similar view to Starkie's was expounded later in the century by E.C. Clark (1880), a Cambridge professor who set out to explain both Roman and English criminal law on Austinian lines. Defending the McNaughtan rules against criticism from Markby (1885 [1871]), Clark reasoned that an understanding of what was morally wrong by the standards of the community was what was required to establish liability: "if a man has capacity to know that his conduct will be generally disapproved by the community amongst whom he lives, he has certainly sufficient reasonable ground to put him on his enquiry whether the same conduct may not be regarded as illegal by the same community, as a whole: and, further, whether it may not, being so recognized, be the subject of penal or criminal prosecution" (1880: 66-7). The notion of a putatively insane defendant reasonably inquiring into the state of the law illustrates only too well the complaint of alienists such as Maudsley (1874: 97) that the law required a lunatic to be "reasonable in his unreason, sane in his insanity".

The basic proposition arrived at by the Criminal Law Commissioners - that insanity provides a limited exception to the rule that ignorance of the law is no excuse² - remained an important rationale for McNaughtan insanity (see for example Amos 1909; Stroud 1914; Ch. 6 below).³ At a more fundamental level, the essential conceptual underpinning of early nineteenth century legal discourse - the rational subject calculating the consequences of infringing clear and certain laws - has remained the basis of orthodox criminal law scholarship down to the present day (Norrie 1993, Ch. 2 and *passim*).

2. "The rule is not, that a man is always presumed to know the law, but that no man shall be excused for an unlawful act from his ignorance of the law" *R v Bentley* (1850) 3 Cox C.C. 406 at 408. See also Williams (1961: 289-90) on the abandonment of knowledge of the law as a factual presumption.

3. A recent version of the argument can be found in Dennett (1984: 161), whose philosophical study of free will probably owes no direct debt to Austin or the commissioners.

Bramwell v. Maudsley

In the Victorian debate over insanity and responsibility, no two protagonists appeared more sharply opposed than Baron Bramwell and Dr Henry Maudsley. Bramwell, a Baron (i.e. judge) of the Exchequer and probably the most doctrinaire *laissez-faire* individualist on the Bench (Atiyah 1980: 374-80) infuriated the medical profession by his scathing comments in cases such as Dove (1856) and Haynes (1859; see Smith 1981: 104-5, 134-7), by his uncompromising evidence to the Royal Commission on Capital Punishment of 1864-6, and by the defence of the M'Naughtan rules which he published after his elevation to the House of Lords (Bramwell 1885)⁴ Maudsley was the most thoroughgoing determinist and materialist among Victorian alienists⁵ and his Responsibility in Mental Disease (1874) was the most fully-argued defence of the medical view of insanity. Yet the two had much in common: not only in a shared admiration for the evolutionist sage Herbert Spencer (who coined the phrase "survival of the fittest"),⁶ but in their assumptions about law and punishment.

Bramwell's view of insanity was straightforwardly Benthamite: "The question ... should be, not whether the person accused of a crime is mad, but whether he understood the law's threat" (1885: 893). Maudsley accepted that the purpose of punishment was deterrence, both of the offender and of others, and that punishment for this purpose was compatible with determinism (1888: 165). What he objected to was "the angry feeling of retaliation which may lie at the bottom of any judicial punishment" (1874: 78). Bramwell disavowed any such angry feelings, but he drew from this a conclusion quite contrary to Maudsley's: "The lunatic committing a crime is certainly less an object of anger and hate than the man who in full possession of his senses commits one. But the law does not punish for revenge, but for prevention" (1885: 896). "Pitiable" though he might be, "the insane man having less mental control than the sane, there is the more necessity for the law stepping in to help him and deter

4. See the responses to Bramwell's article in the Lancet (1885) and Journal of Mental Science (JMS 1886).

5. Though even his position was not unequivocal: see for example Maudsley (1870: 123-9).

6. Bramwell considered Spencer "the profoundest thinker of the age" (quoted by Atiyah 1980: 374-5). Spencer was the philosophical doyen of Victorian neurology and psychiatry (Clark 1982), and Maudsley acknowledged his debt to him (Turner 1988: 167).

him from committing mischief" (1885: 894).

For Maudsley (1874: 5), punishing an insane person merely because he knew that he was breaking the law was like holding an epileptic responsible for his convulsions. Bramwell, however, argued that many insane persons could not only understand the law's threats but be deterred by them. The management of the mad in asylums proved that they were "restrained and kept in order in the same way that sane people are, though with more difficulty" (1885: 894). Maudsley (1874: 4) accepted that the insane were restrained by the same motives as the sane, but insisted that "these motives are only effective within limits, and that beyond those limits they are powerless, the hope of reward being of no avail and the expectation of punishment actually provoking more unreason and violence." If hanging could deter the mad, he remarked, "it would be a matter of just surprise that the habit of confining lunatics in asylums has not availed to deter them from going mad" (1874: 127).

The most contentious issue dividing the majority of alienists from the judiciary was that of "irresistible impulse", and especially of impulses to commit homicide. Bramwell declared in one case (Humphreys (1878) quoted by Taylor 1891: 780) that he "did not believe in homicidal impulse at all". What was called an impulse was simply a motive requiring to be restrained by punishment:

The homicidal maniac has a morbid craving for taking life. The not doing so is painful to him, the doing so pleasurable. We may wonder that it is so, but so it is....Why should the persons who commit offences under the influence of their vicious desires or appetites - or "manias," if that is the right word - not be punished, i.e. not be threatened with punishment?...Should the law not direct its threat against one who stands so much in need of it, who, unless fortified by it, is so likely to do wrong?⁷

For Maudsley, however, homicidal impulses were not ordinary desires but rather a form of "masked epilepsy. The diseased action has been transferred from one nervous centre to another and instead of a convulsion of muscles the patient is seized with an irresistible convulsion of ideas" (1874: 166). The notion of masked epilepsy originated with the French

7. Bramwell, letter to the Spectator, 1872, quoted by Fairfield (1898: 43-4)

alienist Morel, who from observations of asylum patients concluded that there was an "epileptic character" marked by irritability and anger, and at worst by outbursts of "fury" which might be associated with fits or independent of them. From here it was a small step to the view he advanced in 1860 that people who showed signs of epileptic character without fits were in fact suffering from "masked epilepsy" (Temkin 1971: 317-8, 364-5). The work of the neurologist John Hughlings Jackson, who in the 1860s explained epilepsy in terms of damage to the higher, most recently evolved, centres of the brain, became a paradigm for the scientific understanding of brain disease, and Jackson's suggestion that there was no essential difference between epilepsy and insanity (Young 1970: 206-8) inspired a generation of alienists, including Maudsley (Clark 1982).

Bramwell did accept that there might be people who knew they were breaking the law but who were not deterrable, for example a woman who killed her children so as to send them to heaven, "indifferent as to her own fate." But such cases should not be catered for by modifying the McNaughtan rules: "The rule should be plain and simple, though exceptions might be introduced into its application" (1885: 896). Maudsley presented a mirror image of this argument: although people ought to control their homicidal impulses, "to conclude in a particular case that an impulse springing from disease might have been resisted and was not, and thereupon to hang the person, is to assume an insight which no mortal has or can pretend to have" (1874: 164). The only just rule, therefore, was to treat all such impulses as irresistible. The simple rule which Maudsley favoured was the "product" test introduced into the law of New Hampshire by the case of State v. Pike (1869),⁸ according to which a defendant was not liable for an act which was the product of disease.

Thus, both Bramwell and Maudsley framed their arguments in terms of a Benthamite "economy of threats", and agreed that what was needed was a simple test that would ensure the predictability and deterrent effectiveness of the law while sparing those who could not be deterred. Where they differed was over the deterrent efficiency of hanging lunatics. Maudsley's argument, that it was unnecessary because confinement, whether in a prison or an asylum, was

8. Maudsley (1874: 101). For the Pike case and its background see Hughes (1986: Ch. 6).

an effective deterrent punishment (1874: 26-7) pointed logically to the abolition of hanging for all offenders. "Abolish capital punishment and the dispute between lawyers and doctors ceases to be of practical importance" (1874: 129).⁹ To the question why it was worse to hang the insane than the sane, Maudsley had no consistent answer. He pointed to "the obvious difference between him who will not and him who cannot fulfil the claims of the law" (1874: 111). Elsewhere, however, he acknowledged that this difference was anything but obvious in a world where "every crime done under the sun is an event which has come to pass by natural law, and which could not have been otherwise, all the circumstances being exactly as they were" (1888: 165). To punish the criminal "for what he could not help doing", he now argued, was justifiable as a lesson to him and to others, whereas an idiot or insane person could not learn from punishment and "its infliction, so far from serving as a warning to others, is an outrage to social feeling" (*ibid.*). In a later paper, he admitted that "society" could hang the mad if it thought this was "right for its own protection....the individual lives for the society, not the society for him, and, living for it, he must die for it, even if he be mad, if it think fit." (Maudsley 1895: 770.)

Maudsley's brand of scientific naturalism¹⁰ had trapped him in an insoluble contradiction. The physician's claim to authority in legal matters rested on his ability "to point to the conditions of disease which constitute incapacity" to obey the law (1874: 111), yet Maudsley's hard determinism made this distinction unintelligible. Other physicians avoided this trap by maintaining a place for free will. As Clark (1988: 90) points out,

From the standpoint of evolutionary physiological psychology, fully realized, responsible voluntary actions were, perhaps more than ever before, regarded as the proper ends all healthy "nervous" (and thus, by extension, "psychical") functioning - as "Nature's" chosen instruments for the furtherance of "mental" and "social" evolution. This placed a very high positive valuation, or moral premium, on responsible volitional action as the "proper" end of all mental activity.

In this framework, the distinction between responsible and involuntary conduct was

9. Although where, as in Tuscany, there was no death penalty, the dispute was still of great symbolic importance: see Guarnieri (1994)

10. "Naturalism asserted the universal scope of scientific method and procedure, the adequacy of science as a universal deterministic cosmology beyond which no further knowledge or way of knowing exists, and the universality of natural law." (Barnes and Shapin 1979, quoted by Smith 1981: 9.)

clearly a matter of science (Smith 1981: 164), but it was not one which permitted any clear boundary-line to be drawn:

Between the state of the well-balanced Mind, in which the habit of Self-control has been thoroughly established, so that the whole activity is directed by the Moral Will of the Ego - and that of the raving madman, whose reasoning power is utterly gone, who is the sport of uncontrollable passions ... vast as the interval may seem, there is an insensible gradation.

(W.B. Carpenter, 1874, quoted by Clark 1988: 74.)

This led J.W. Hume Williams, a lawyer sympathetic to the medical viewpoint, to conclude that "a want of harmony must ever exist between the legal and medical doctrines of insanity" because "Law demands a fixed rule - Medicine admits but a general principle" (1890: 2). Bramwell, on the other hand, was dismissive of the claims of medical expertise:

Insanity is no more a question for an expert than lameness.... A man accustomed to insane people may lead an insane person more easily to betray his insanity than one not familiar with them. But when we know what the man does, and says, and thinks, one man is as competent a judge as another.

(Bramwell 1885: 899)

As the Lancet (1885) pointed out, Lord Bramwell might well have needed an expert to tell him "whether lameness was real or apparent". In any case, by the 1880s and '90s this kind of scepticism towards medical knowledge was falling from favour among legal writers (e.g. Harris 1886; Willoughby 1890; Pitt-Lewis et al. 1895). Medicine was establishing itself as a profession whose prestige rested on scientific knowledge rather than its practitioners' gentlemanly manners (Peterson 1978; Bynum 1994). A. Wood Renton, a leading authority on lunacy law, took judges and lawyers to task for dismissing medical theories on the basis of "speculative and social considerations", rather than critically examining the evidence on which they were based (Renton 1887: 341). The most important attempt to base a legal theory of insanity on a careful reading of the medical literature was made by J.F. Stephen in the second Volume of his History of the Criminal Law of England (1883).

J.F. Stephen: "A bridge across the gulf"

Both as a judge and as a writer on law, Sir James Fitzjames Stephen "was probably the most formative single influence of the nineteenth century" on common-law criminal jurisprudence (Smith 1988: 70). Influenced by the analytical approach of John Austin (Stephen 1861) Stephen sought to found criminal law doctrine on "the science of understanding and correctly classifying large departments of human conduct" (Stephen, 1863: 337; see also 330). In his chapter on "The Relation of Madness to Crime" in the History of the Criminal Law of England (Vol. 2, Ch. 19) Stephen attempted to integrate the medical and legal approaches to the classification of conduct as sane or insane. The result was a work of enduring influence, as can be seen, for example, in the way Hyman Gross's Theory of Criminal Justice (1979: 297, 302-4, 307-8) repeats its central arguments (though Gross, cheerfully confessing a "lack of zeal for intellectual genealogy" (xvi), omits to acknowledge his debt).

Stephen was one of many intellectuals of his day whose adherence to "scientific naturalism" - the assumption that the methods of science offered a uniquely valid key to truth in all fields of knowledge - undermined their Christian faith (Turner 1974). By the time he wrote the History, Stephen seems privately "to have achieved an emotional and intellectual accommodation with faithlessness" (Smith 1988: 246), but like Browning's Bishop Blougram he was acutely aware of the value of "the chain of faith" in governing "the rough purblind mass we seek to rule."¹¹ As Fifoot (1959: 123-4) notes, the History responds to this dilemma with an emphatic reaffirmation of the criminal law's role in moral education: "A man may disbelieve in God, heaven and hell, he may care little for mankind or society or the nation to which he belongs - let him at least be told plainly what are the acts that will stamp him with infamy, hold him up to public execration and bring him to the gallows, the gaol or the lash" (Stephen 1883, III: 367).

It might seem paradoxical that this stern moralist should be the leading judicial advocate of a relaxation in the rigour of the McNaughtan rules, but the paradox is more apparent than real. Stephen had "no sympathy" with the humanitarian protestations of alienists who appealed to "that long-suffering charity which overcometh evil with good". On the contrary, "the proper

11. Robert Browning, Bishop Blougram's Apology (1855). On Stephen's authoritarian political philosophy see Colaiaco (1983).

attitude of mind towards criminals is not long-suffering charity but open enmity, for the object of the criminal law is to overcome evil with evil".¹² But he did not find it "expedient that a person unable to control his conduct would be the subject of legal punishment". Not only would the law have no deterrent effect on such a person, but by punishing someone who would not be held morally culpable, the law "is put out of harmony with morals, and legal punishment would not in such a case, as it always should, connote . . . moral infamy" (Stephen 1883, II: 171-2).

Stephen's view of the criminal law as an organized expression of hatred may be hard to reconcile with the Christian morality which, in other respects, he took the law to embody, but it did enable him to uphold the moral significance of punishment in face of the deterministic implications of psychological science: for "love and hatred ... depend upon sympathy and antipathy; not upon theories as to the freedom of the will" (*ibid*: 84).

Twenty years earlier, in his General View of the Criminal Law (1863) Stephen defended the McNaughtan rules on conventional utilitarian grounds, but was prepared to adopt a relatively generous interpretation to bring them into line with positive morality:

It is sometimes said that the knowledge required to constitute malice is not a knowledge that a given act is wrong, but a knowledge that it is illegal. If this were true, it would set the law in opposition to those moral sentiments on which it ought to be founded, for the sake of obtaining a degree of precision not really greater than that which it possesses at present.

(Stephen 1863: 93.)

In this work Stephen accepted the medical evidence of the existence of insane impulses; the only question, he argued, "which the existence of such impulses can raise for the administration of justice is, whether the particular impulse in question was irresistible as well as unresisted". If a man killed his baby because its crying got on his nerves, that would be murder. It would equally be murder if his nervous irritation arose from some disease. On the other hand, those "women who, without motive or concealment, kill their children after recovery from childbed" afforded probably the clearest and strongest examples of genuinely irresistible

12. Stephen (1883, II: 179), criticising Bucknill and Tuke (1874).

impulses (*ibid*: 95). Quite what it was, apart from the gender of the parent, which differentiated the particular impulses in these cases was far from clear. In his draft Criminal Code of 1879, Stephen suggested that the test to distinguish between "irresistible" and "unresisted" impulses should be to ask "whether the impulse was so violent that the offender would not be prevented from doing the act by knowing that the greatest punishment permitted by law for the offence would be instantly inflicted".¹³ The Royal Commission which examined the Code rejected this test as too "metaphysical" to be safely left to a jury (Royal Commission on the Criminal Code Bill 1878-9: 18; Wiener 1990: 274).

In his History, however, Stephen (1883, II) focussed not on the character of the impulse but on the individual's capacity for self-control, which he defined as the ability "to attend to distant motives and principles of conduct, and to connect them rationally to the act under consideration" (170). This distinction between the strength of the temptation and the ability to resist it was crucial to Stephen's later theory. It enabled him to reconcile his new, broader view of the insanity defence with his rejection of any defence of duress. Duress was simply an extreme form of temptation, and "Surely it is at the moment when the temptation to crime is strongest that the law should speak most clearly emphatically to the contrary" (107) - just as Bramwell argued with regard to insane impulses. Stephen accepted that the same argument applied to those insane "impulses to do harm in various ways which the sufferer struggles against and in many cases overcomes" (169). But when "madness interferes with the power of self-control, and so leaves the sufferer at the mercy of any temptation to which he may be exposed" (170) it constituted an excuse.

The distinction Stephen sought to draw between different kinds of insane impulses is illustrated by examples from the two medical writers on whom he chiefly drew, Maudsley and the German Wilhelm Griesinger (1817-68).¹⁴ On the one hand there is the case discussed by

13. Stephen quotes this in the History (1883: 171) with the comment that he now has "no strong opinion" about it.

14. As Griesinger points out in the preface to the second edition of his work, of which Stephen used the English translation (1867), it does not depart substantially from the theory of madness presented in the first edition (1844), which is discussed in detail by Doerner (1981: 272-90). This sets in perspective the notion that medical knowledge of madness had dramatically advanced since McNaughtan's time. As Doerner's sympathetic interpretation suggests, Griesinger's account of the interplay between the physiological and psychological elements of madness possesses a subtlety unmatched in the work of English alienists of Maudsley's generation.

Griesinger of a woman who "felt suddenly and violently impelled to kill with a knife the child she was nursing" (Stephen 1883, II: 172), but who successfully resisted the impulse. She would have been responsible had she given way to her desires, because she possessed "the power of comparing together the different motives by which [her] conduct [might] be affected, and so making a choice between them" (173). On the other hand there are cases where insanity alters not only "the motives of action" but also "their mode of operation" (*ibid.*). This category includes the cases of convulsive homicidal mania described by Maudsley, in which the spasmodic discharge of emotion overwhelms any intellectual capacity to contemplate what one is doing (174). Such a person could not truly "know" that what he was doing was wrong: "for how does any one know that any act is wrong except by comparing it with general rules of conduct which forbid it, and if he is unable to appreciate such rules, or to apply them to the particular case, how is he to know that what he proposes to do is wrong?" (170). (This is essentially Austin's "subsumption" principle, but applied to moral rather than legal rules.) In between these two categories of impulsive actors there is a third, whose power of self-control or of weighing up motives and principles is weakened but not destroyed. Maudsley provides the example of a madman who knows murder is wrong, and struggles against the inclination to kill his supposed enemy, but who ultimately gives way. Stephen agrees with Maudsley that "To be strictly just we must admit some measure of responsibility in some cases, though not the full measure of a sane responsibility" (quoted *ibid.*: 175).

To accommodate such intermediate cases, Stephen proposed that juries should have a choice of three verdicts when insanity was in issue: "Guilty; Guilty, but his power of self-control was diminished by insanity; Not guilty on the ground of insanity" (*ibid.*). Those who received the intermediate verdict should be sent to special asylums, "in which they should be treated, not as innocent lunatics are treated, but as criminals, though the discipline might be so arranged as to meet the circumstances of their disorder" (180). The proposal for an intermediate verdict was not far removed from one about which the Home Secretary, Sir William Harcourt, had consulted Stephen and other judges in 1882. Stephen had found the proposal poorly drafted and advised

waiting until a more comprehensive Criminal Code Bill could be introduced.¹⁵

To allow diminished self-control as a partial defence was to unlock a door that Stephen was anxious not to open too wide: "We do not recognise the grossest ignorance, the most wretched education, the most constant involuntary association with criminals, as an excuse for crime....This should lead to strictness in admitting insanity as being in doubtful cases any excuse at all for crime, or any reason for mitigating the punishment due to it" . On this ground Stephen argued that loss of the power of self-control should not be a defence where it was brought about by the defendant's "own default", for example by "habitual indulgence in disgusting vices", or even failing to take "proper precautions" against the consequences of being born to insane parents (177). The idea that many of the insane were "responsible for their irresponsibility"¹⁶ was central to late Victorian medical psychology and Stephen's qualification of the defence of self-control could have greatly restricted its scope. Indeed, if he was right in arguing that those who completely lacked self-control equally lacked the knowledge that their act was wrong, it might have been logical to qualify the M'Naughtan rules themselves in this way, though Stephen did not make such a proposal. In fact he was more lenient in practice than in theory: he gave the defendant in Davis (1881) the full benefit of his interpretation of the insanity defence, although Davis was suffering from delirium tremens, a clearly self-induced condition.

Stephen was also very reluctant to extend the defence to "moral insanity", a condition where a person's character underwent a sudden change (usually following some physical or psychological trauma) marked by a loss of "moral sense", which Maudsley (1870) conceived as a part of the brain carrying inherited moral instincts. Maudsley's (1874: 172) description of the condition as one where "the reason has lost control over the passions and actions, so that the person can neither subdue the former nor abstain from the latter, however inconsistent they may be with [his] duties and obligations...however disastrous to himself" seems clearly to indicate that it involved a loss of self-control owing to disease. Stephen, however, did "not quite see why a person, who suddenly becomes bad by reason of disease, should be in a better position than he

15. PRO HO45/9643/A3573/5

16. W.B. Carpenter, Nature and Man (1888), cited by Clark (1988: 80). Clark's essay provides an excellent account of Victorian theories of self-induced insanity and its relation to freewill.

who is bad by birth, education and natural character" (1883, II: 185) - an argument which could be (and in recent times has been: Morris 1981) taken to destroy the entire rationale of the insanity defence.

In his discussion on moral insanity, Stephen refers to an article by the Scottish prison surgeon J.B. Thomson (1870) which was one of the earliest studies of the "criminal class" from a medical point of view. Thompson observed that only three out of 430 murderers displayed any signs of remorse, and concluded from this that "great criminals" in general lacked moral sense. Stephen observes that in his experience as a judge, murderers usually display "abominable heartless ferocity....This peculiarity", he adds, "appears to me to be a reason, not for sparing them, but for putting them to death" (185). Such criminals could certainly be put to death under Stephen's interpretation of the McNaughtan Rules, for they would know their crimes were wrong in the sense of being contrary to positive morality: "A person who disbelieved in all moral distinctions, and had ridded himself" - or been deprived by disease or heredity - "of all conscience, would know that murder is wrong, just as an atheist would know that most Englishmen are Christians" (167). But if the law were amended as Stephen proposed, to make complete lack of self control a full, and diminished self-control a partial, defence, the position would be more difficult. Those who lacked the higher nerve-centres in which moral sentiments supposedly resided would surely be impaired in their ability to compare their proposed actions with general principles of conduct. The same would apply to the "weak-minded" criminals identified by another prison doctor, Nicolson (1873-5), whose offending was the product not of rational economic calculation but of an inability to resist passing temptations. Maudsley's view was that criminals in general were largely "the unfortunate victims of a vicious organization and a bad education", but that prison was "the best treatment for the sort of insanity from which criminals suffer" (Maudsley 1874: 28, 27). But this solution to the dilemma entailed that society should "get rid of the angry feeling of retaliation" (*ibid*: 28), which was the very basis of Stephen's theory of punishment and thus of his case for extending the insanity defence.

The distinction between moral insanity and other forms of mental disease affecting self-control was therefore crucially important if Stephen was to achieve his purpose of excluding a limited group of offenders from punishment and thereby reinforcing the denunciatory effects of

punishing the remainder. But at this very point Stephen's argument abruptly breaks off, with the comment that the "importance of the whole discussion of the precise terms in which the legal doctrine on this subject is stated may easily be exaggerated so long as the law as administered by juries" (185).

One might wonder in the light of that remark what was practical importance of the preceding 60 pages. But as we shall see in the next Chapter, Stephen does seem to have either influenced some of his fellow-judges, or at least crystallized an unease about the McNaughtan rules that they already felt. The Journal of Mental Science's review (JMS 1883), despite reservations over points such as the exclusion of self-induced insanity, "heartily commend[ed]" the book to its readers. Contrasting Stephen's attitude with that of Bramwell, the JMS (1886: 70) hailed Stephen for having thrown "a bridge across the gulf separating the two professions". That bridge, which Bramwell was accused of doing his best to destroy, was one which many members of the medical profession were eager to see built.

The Psychiatric Profession and Legal Reform

In order to understand the attitudes of late-Victorian alienists towards criminal law reform, we need to examine the predicament in which they found themselves as a profession.

Between the 1870s and the First World War the optimism which had characterized the early Victorian "golden age" of asylum psychiatry (Unsworth 1993) gave way to a much bleaker outlook which recognized the increasingly evident reality that for most of its burgeoning population the asylum was a place of custody and not of cure (Mellett 1982; Scull 1993: 303-10, 324-8; Oppenheim 1991: 63-4). Asylum superintendents felt themselves to be poorly paid, of low social standing, and isolated from the rest of the medical profession; and the lot of their assistants was far worse (Mellett 1982: 42-3; Russell 1988). The elite among alienists - men like Henry Maudsley and Charles Mercier who were among the leading contributors to *the debate on criminal responsibility* - made their money from well-to-do private clients and their reputations from lecturing and writing. (Scull 1993, Ch. 5).

As Clark (1982: 309) has argued, the alienists' response to their marginal position

was typically defensive and conciliatory, and almost invariably subsumed in

more general expressions of solidarity and common interest with other, more established and prestigious forms of social, intellectual, and moral authority in Victorian society. Far from trying to frighten powerful interest-groups by making radical criticisms or extravagant demands, later-Victorian psychiatrists sought rather to reassure influential contemporaries by emphasising the modesty of their claims.

Clark treats the controversy over the insanity defence as an exception to his argument about psychiatry's conciliatory stance, but we shall see that many nineteenth-century alienists took a position on this question quite consistent with his general thesis. Alienists, however, found themselves torn between a desire for reconciliation with the law and their adherence to theoretical views which appeared to threaten the distinction between crime and insanity.

Throughout the nineteenth century debates on criminal responsibility, alienists relied on the "fact" that insanity was a disease of the brain (Jacyna 1982; Smith 1981: 40-56). Writers like Maudsley and the neurologist John Hughlings Jackson developed theories which related insanity to the latest findings of neurology and evolutionary biology. As Jacyna (1982) points out, however, beneath their veneer of sophistication these theories did little more than give a "scientific" form to the common-sense assumptions of the Victorian middle class, for example in equating mental health with the control of impulses by the will. Despite a great deal of effort expended on autopsies of dead patients, few consistent findings emerged to lend empirical substance to these neurological speculations (Donnelly 1983: 135; Busfield 1986: 263; Scull 1993: 240-1, 263). J. Batty Tuke (1891: 1161-2), even while he asserted that "a chain of evidence is being constructed, showing the probable and possible links between certain lesions and certain classes of symptoms", had to admit that "the general conception of insanity is on the same level as that of 'dropsy' a century ago."

Hughlings Jackson and his followers adopted Spencer's doctrine of psychophysical parallelism, which held that every mental state corresponded to some physical state, but neither should be regarded as the cause of the other (Young 1970: 96, 196; Clark 1982: 206-11). By adopting parallelism as a provisional theory, physicians could remain neutral in metaphysical debates about the relationship between mind and brain, and also sidestep accusations of thoroughgoing materialism. According to Jackson, his theory was "thoroughly materialistic as to

the nervous system" but "not materialistic at all as to mind" (quoted by Clark 1982: 212). Except for Maudsley, most alienists followed the lead of Spencer and Jackson in avoiding "hard" determinism. In this respect orthodox medical thought was quite compatible with the legal outlook, and Stephen (1883, II: 130-1) appears to have subscribed to a form of psychophysical parallelism.

Where psychiatric theory was not so clearly compatible with legal orthodoxy was in its use of the concept of degeneration. Since the inhibitory functions of the higher brain centres were regarded as the most advanced product of evolution, their breakdown in lunatics and criminals was seen by degeneration theorists as a regression to a more primitive evolutionary state. As evolution proceeded by the inheritance of acquired characteristics, vicious habits and the effects of a squalid urban environment could be passed on from generation to generation (Pick 1989: 203-9 and passim.)

Theories of hereditary degeneration were attractive to alienists for several reasons. Such theories enabled them to exchange "their ineffectual and traditionally-despised role of 'lunatic physician' for the more congenial and socially prestigious role of scientific observer" (Clark 1982: 167), studying such momentous questions as the place of the human mind within evolution. Degeneration could be seen as a common condition uniting the heterogeneous populations of lunatic asylums, and its hereditary nature also explained why their treatment produced such poor results (Rosenberg 1976: 42, 51). Not only were alienists absolved from their failure to cure the insane, but they were able to claim expertise on a far-reaching social problem: "degeneration theory, in effect, lifted alienists from the stigma of therapeutic defeat to the pedestal of social prophecy" (Shortt 1986: 104). Their main message was the evolutionary inferiority of women, the poor (specifically the urban "residuum": Stedman Jones 1984), and non-white races. Both "fair-skinned ladies and black savages...were cast in the role of irrational, childish creatures, incapable of functioning as fully mature human beings who practised self-mastery under the will's supervision" (Oppenheim 1991: 283).

Degeneration theory implied that the criminal and "his degenerate confrère the lunatic" could not be differentiated and "pigeon-holed" as neatly as the law supposed (Goodall 1896). This point was made forcefully by two of the three alienists who gave evidence to the

Departmental Committee on Prisons (known as the Gladstone Committee) in 1895. Dr Thomas Clay Shaw suggested that nearly all criminals had some degree of "neurotic taint" (Qq. 5,992-3) and that "the treatment of criminals is very much allied to that of lunatics, and is essentially a medical question" (Q. 6,012). Dr Bevan Lewis, one of the leading scientific researchers among the alienists, did not go quite so far, but regarded the habitual criminal and the lunatic as "simply morbid branches of the same degenerate stock" (Q. 9,083). He acknowledged that it was "a great question how far the medical authorities ought to dictate" where to draw the line between insanity and crime, since "a very large proportion of the criminal class" stood on borderline between the two (Q. 9,085). On the other hand, the Superintendent of Broadmoor Criminal Lunatic Asylum, Dr David Nicolson, made it clear that in his view the great majority of criminals were sane and responsible for their actions (Q. 9,283). The Committee's report did its best to fudge the differences between medical and moralistic views of crime (see Garland 1985: 174, 266; Wiener 1990), but did accept that "weak-minded" criminals were not "fully responsible" and required special treatment (see below: 88).

At about the same time that the Gladstone Committee was deliberating, a committee of the Medico-Psychological Association (MPA), the alienists's professional body, was examining the question of criminal responsibility. The campaign for a review of the law on insanity was launched by Drs. Charles Mercier and Lionel Weatherly at the meetings, held on the same day in the same room, of the MPA and the BMA Section of Psychological Medicine (BMJ 1894, 2: 33; BMA 1894). Both organisations voted to establish committees to pursue reform, but the BMA Committee turned out to be unconstitutional (BMA 1894: 353; MPA 1895), which was a blow to the cause of reform as the BMA was a much more effective lobby group than the MPA (Turner 1991). The BMA section's unanimous resolution that the present law was "not in accord with modern medical science" sparked off a flurry of correspondence in The Times.¹⁷

In their papers to the BMA both Weatherly and Mercier advocated a "product" test: was the defendant insane, and was the crime caused by his insanity? According to Weatherly, the MPA Committee, of which Mercier was appointed Secretary, unanimously adopted a resolution

17. Times 3 Aug. 1894 (report of BMA meeting) to 10 Oct. 1894 (correspondence declared closed). The cuttings were filed by the Home Office and preserved in the Public Record Office (PRO), file HO 45/9744/A56274.

to this effect. At the next meeting, however, when Weatherly was absent owing to illness, the three members of the committee present appointed a subcommittee consisting of two them, Dr Mercier and Dr William Orange, to draw up a report (MPA 1895: 745). Orange had been Superintendent of Broadmoor until 1887, and had contributed a well-researched article on the insanity defence to Tuke's Dictionary of Psychological Medicine (Orange 1892a). He now prepared a memorandum for the MPA committee (Orange 1896) in which he pointed out that in 1891-3 nearly as many alleged murderers had been found insane as had been sentenced to death. He concluded that the judges were, in practice, following Stephen's (1883, II: 154) suggestion that the McNaughtan rules could be interpreted so broadly as "to dispose satisfactorily of all cases whatsoever". Orange's analysis provided the basis of the committee's report, which began by pointing out the need "to avoid injuring the medical profession, either by advancing statements that could be controverted, or by countenancing the view that medical men are less solicitous than any of their fellow citizens for the protection of the community from criminal or hurtful acts" (MPA 1896: 863). The "Committee felt the ground for an alteration in the law was dissolving beneath their feet" and was "unable to make any recommendations for the amendment of the law" (p. 863-4, 866). When this report was presented to the Association's annual meeting in October 1895, Weatherly angrily opposed its adoption, and a decision on it was postponed until the following year.

Orange's successor at Broadmoor, David Nicolson, was President of the Association when the report was circulated and gave it his full support, warning members that "they might do more harm than good by being hysterical on a question of such grave import" and that "no active steps should be taken that would bring the Association into a false position with the judicial authorities of the country, and with the members of the community" (Nicolson 1896: 665). In 1896 the Association unanimously adopted the report, subject to an amendment which indicated that it not endorse "doctrines and definitions" contained in the McNaughtan Rules (MPA 1896: 672).

The MPA's report exemplifies what Clark (1982: 10) describes as late-Victorian psychiatry's strategy of "permeation" rather than confrontation in its dealings with established forms of authority. The editors of the Journal of Mental Science summed up this strategy, as well

as their perception (which was substantially correct, as Ch. 3 will show) of its practical success in the courts:

The advance of medical science has discredited the answers of the judges [in *McNaughtan's case*] as they were formerly interpreted; but a constructive policy does not at present appear to be possible. Time will infiltrate the courts with modern ideas; and the stability of jurisprudence, as administered by able men of whom the nation is justly proud, is wisely resistive of immature proposals.

(JMS 1896: 823-4)

Mercier - a man, like Maudsley, of wide interests and conservative views¹⁸ - now emerged as the leading medical authority on criminal responsibility, which he discussed in three books (Mercier 1905, 1911, 1918), several shorter papers and numerous commentaries on medico-legal cases in the Journal of Mental Science. The latter, many of which will be cited in the next chapter, show that his conciliatory attitude towards the judiciary did not inhibit him from directing his acerbic wit at individual judges when the occasion arose. Much of his energy, however, went into trying to convert his colleagues to the legally orthodox, but medically heretical, view that "to put it with brutal plainness, it is in many cases right and just to punish an insane person for wrong-doing" (Mercier 1898a). Like Bramwell (1885) and Stephen (1883, II: 180-2), Mercier maintained that discipline in asylums was based on the practice of holding patients responsible and punishing them, and it was mere "cant" to call such punishments "withdrawals of privileges" (Mercier 1898a: 586). Some, if not most, of Mercier's colleagues found such views hard to stomach, but they provided little by way of an alternative.¹⁹

The divisions within the psychiatric profession are well illustrated by two successive Presidential Addresses at the MPA's Annual Meetings. Robert Jones's address in 1903 was a bleakly eloquent exposition of the degenerationist view of the ills of modern civilization. Echoing the views of the Italian criminal anthropologist Lombroso, he declared that "the

18. For a critical account of Mercier's views and career see Bowden (1994).

19. See for example the comments by T.S. Clouston on Mercier (1898a); two leading articles in the BMJ, 1905 (unsigned but almost certainly by T. Claye Shaw: "The Writer of the Article" (1905) announces that he will defend his view in a paper to the Medico-Legal Society and Shaw (1906) duly does so, to scathing comments by Mercier); and the Lancet's generally polite review (1906a) of Mercier (1905a), claiming his views on punishment are "completely at variance with the bulk of expert opinion". Some of the more radical medical views of responsibility are discussed in Ch. 4 below.

instinctive criminal and the morally insane" - meaning what other writers called moral imbeciles - were "identical individuals, characterized by the same physical stigmata of degeneration" (Jones 1903: 368). The next annual meeting was treated to an equally eloquent address by Mercier, in which he ridiculed the notion of "physical stigmata of degeneration" and argued that nothing was more likely to weaken "that sense of responsibility which it should be the aim of every system of criminal law to foster" than to tell people that they were predestined to a life of crime (Mercier 1904: 958).²⁰

The bulk of Mercier's address was given over to his proposed "middle way" with regard to responsibility, which he presented at length in his book Criminal Responsibility (1905a). Having explicitly set out to complement Stephen's work (p. 4), Mercier arrives by a somewhat roundabout route at a position only subtly different from Stephen's own. Where Mercier's and Stephen's theories chiefly differ is over the issue of self-control. Stephen, as we have seen, concludes that lack of self-control should be an excuse, but that it could be accommodated within the existing law since "the power of self control must mean a power to attend to distant motives and principles of conduct, and to connect them rationally to the act under consideration" and the lack of this power amounted to lack of knowledge of wrong (Stephen 1883, II: 170). Alienists found this argument useful (Orange 1883), but also excessively "metaphysical" (Maudsley 1895), "jugglery" (Anon. 1906) and "at variance with the realities of asylum life" (Anon. 1883). Mercier (1905a: 194) put the objection neatly by pointing out that it was one thing to "attend" intellectually to the connection between drinking and getting a hangover, and another thing to resist the temptation to drink. Mercier nevertheless considered that the McNaughtan criteria of knowledge of the nature, quality and wrongness of the act were adequate in most cases provided that the concept of "knowledge" was broadly interpreted (*ibid*: 184-5, 204). The answers in the McNaughtan case dealing with the effect of delusions were limited to persons "suffering from partial delusions only and not otherwise insane" - "a class of offenders that does not exist, and never has existed" (174). A person under the influence of delusions "is not only influenced by facts which are not facts except to him, but he fails to recognize facts which are facts to everyone

20. See also Mercier's comments on Shaw (1906)

but himself. He does not know, in the full sense of knowing, the nature and quality and wrongness of his act" (193). Because the insane were likely to be confused to some extent in all areas of conduct, insanity should always be at least a mitigating circumstance (203).

Like Stephen, however, Mercier had difficulty in deciding how far lack of self-control should excuse the morally insane, and also moral imbeciles, a category in which he was especially interested and which we shall examine in Chapter 4. Mercier's view of moral insanity reflected his experience with his well-to-do clientele and in particular "the sexual and quasi-sexual proceedings of elderly men who, towards the close of a long and reputable life, have experienced a revival of sexual desire", directed towards other men or children (159). In such a case, "the condition of the man is so plainly a departure from health" that "we must feel reluctant to regard such an offender as responsible" to a full extent (160). Moral insanity of this kind should be recognized as a ground for mitigation as Mercier believed it often was in practice (204).

Mercier's proposal that *the confusion engendered by madness should always mitigate responsibility but rarely extinguish it* may well have merit, but his comment that *"the ordinary non-legal user of the English language is aghast at the deformations and tortures to which the unfortunate words [of the M'Naughtan Rules] are subjected, and wonders whether it is worth while to have a language which can apparently be taken to mean anything the user pleases"* (169) applies to his own interpretation of the Rules as much as anyone's. It is quite unclear where exonerating insanity should end and mitigating insanity begin, or what the practical consequences of "mitigation" should be. Mercier was not trying, however, to produce a proposal for legislative reform, but rather an elaborate justification for the status quo, for allowing the M'Naughtan rules and the discretionary powers of sentencers to go on being used as they were by what he considered the more enlightened judges and the more sensible medical men. We shall see in the next chapter how these discretionary powers were used in practice.

Conclusion: The Emergence of a Medico-Legal Discourse

In 1901 Sir Herbert Stephen, son of Fitzjames, attended a meeting of the MPA and contributed to the discussion of a paper by Mercier. The tone of the discussion confirmed an opinion which

Stephen had "lately formed - that we have got pretty well to the end of the old quarrel between you doctors and us lawyers as to the effects of insanity upon legal criminal responsibility" (Mercier 1901: 524-5). Although this remark was to prove distinctly premature, it did reflect a real rapprochement between the two professions both in theory and, as the next chapter will argue, in practice.

In the early Victorian period, legal and medical approaches to responsibility were so sharply opposed that it is reasonable to categorize them as two distinct discourses, even if the contrast between them was less clear cut than some parts of Smith's (1981) analysis suggest. Legal discourse was structured around the relations between the sovereign legislator, the knowing, rationally calculating responsible subject, and the non-knowing, irrational, irresponsible lunatic. "Thus the administration of justice rests on the principle that everyone knows the law and fears its punishments. No-one makes laws for cattle." (Stephen 1863: 87.) Not "free will", but calculation, the rational avoidance of pain and pursuit of pleasure, was the essential feature of the legal subject. "Men calculate some with less exactness, indeed some with more: but all men calculate." (Bentham, quoted by Wiener 1990: 48.) And since even medically certified lunatics shunned pain - otherwise how could they be controlled in asylums? - even they could be deterred by punishment so long as they could understand the law's penalties. Within this discourse there was little place for medical expertise. In formulating the M'Naughtan Rules it "occurred neither to the House of Lords nor to the judges to consult medical opinion, let alone formulate propositions with legal standing that incorporated a medical way of framing the issues" (Smith 1991: 143).

Medical discourse, on the other hand, was structured around the relationship between the rational will and the lower nervous centres. Where the will was not in control, irresponsibility was a scientific fact; the law was simply erroneous (see for example JMS 1863 quoted by Smith 1981: 140; Maudsley 1874). Maudsley, however, at least saw the need to relate the question of responsibility to the legal issue of deterrability, and thus took the first step towards an integration of the two discourses. Legal writers of the 1880s and '90s, for their part (the aging Bramwell excepted), accepted that medical psychology was a science and that legal classifications of insanity must have a scientific basis, even if (like Renton 1886) they ventured to criticize what

they took to be the prevailing doctrines of that science.²¹ Stephen (1883) incorporated substantial parts of Maudsley's (1874) doctrines into his own, and Mercier (1905a) returned the compliment by incorporating - and intelligently criticising - much of Stephen's analysis in his. What differences remained were not contrasts between two discourses but subtle differences of emphasis within a unified medico-legal discourse.²² It was common ground that definitions of responsibility should reflect the legal purposes of punishment, and definitions of legal insanity must take account of, though they need not precisely correspond with, medical classifications of mental disease.

As we shall see, this consensus was a precarious one. It reflected both the strengths and the weaknesses of the alienists' position. Their strength lay in their ability to invoke "science" on behalf of their claims. The later Victorian period was pre-eminently the "age of science" (Knight 1986). Materialist and evolutionary doctrines which had appeared radical and subversive in the politically unstable 1840s provided an ideal middle-class ideology in an era of technological and economic progress and imperial expansion (Jacyna 1981; Desmond and Moore 1992). As A.W. Benn remarked in 1906,²³ the period witnessed "a transfer of authority from religious to naturalistic belief", from "priests and their stories of an unseen universe...to the astronomer, the geologist, the physician and the engineer." What science offered the physician was "not the power to do, but the power to know, and therefore to judge....The experts gained in power not because they could always act effectively, but because they could name, describe and explain." (Peterson 1978: 286.) As "a gentleman and a man of science" (Stephen 1883, II: 125) the medical psychologist was entitled to respect even from the senior profession of the law.

Yet this claim to scientific status had its drawbacks, for it also exposed psychiatry's lack of scientific progress and its isolation from the rest of medical science (Oppenheim 1991: 37; Scull 1993: 250-1). In reality only a handful of alienists could claim membership of the scientific

21. Renton's (1886) critique of mainly French accounts of monomania was a rather dated work, the concept having fallen from favour in France in the 1850s (Goldstein 1987: 192).

22. But cf. the comments by Havelock Ellis and G.H. Savage on Mercier (1904), insisting that responsibility is a "metaphysico-legal" issue to which medicine should not address itself.

23. In his History of English Rationalism in the Nineteenth Century, quoted by Turner (1978: 354). Benn's insight is echoed by, among others, Greenleaf (1983: 238-9); Rose et al. (1984: 46-51); and Sim (1990: 52-6).

priesthood; the asylum superintendent, even if he could find time to compile statistics and dissect his deceased patients' brains, was primarily the modestly-paid administrator of a custodial institution (Russell 1986). Such a marginal profession could not press its claims too far (Clark 1982); and as asylum life settled down to its tedious custodial routine the humanitarian ardour of the generation of John Connolly and Forbes B. Winslow (key witnesses in the Oxford and McNaughtan trials respectively) noticeably cooled.²⁴ But the blunt recognition by Maudsley and Mercier that custody in a lunatic asylum was closely akin to punishment was reassuring in a criminal law context, though it was quite the reverse where civil detention was concerned (Unsworth 1987: 83-4). As The Times (29 Apr. 1882) commented after the acquittal of Maclean, "The prospect of seclusion in Broadmoor for life is no very pleasant one, and, so far as madmen are susceptible of motives, may move others...to struggle against their destructive impulses."

Though Maclean's acquittal led to the introduction, at the behest of his intended victim Queen Victoria, of the verdict of "guilty but insane" in place of "not guilty by reason of insanity" (Trial of Lunatics Act 1883; Walker 1968: 188-92), it did not signal a new legal backlash against the insanity defence. On the contrary, the ensuing quarter-century saw a greater legal receptiveness to psychiatric evidence both in theory and, as the next chapter will show, in practice.

24. See Scull (1985) on Connolly; Clark (1982: 351) on Winslow.

CHAPTER 3

THE LAW IN PRACTICE, 1883-1907

Unravelling the Statistics

If the rapprochement between law and psychiatry which can be seen in the theoretical debate was reflected in the practice of the courts, we might expect the criminal statistics to show an increasing number of defendants being found insane or unfit to plead. We can confine ourselves to murder cases, since this was virtually the only offence for which a significant proportion of defendants were found unfit to plead or insane (the others being attempted murder and arson), and the one with which the public debate was almost exclusively concerned.

What the official statistics (Walker 1968, Appendix A) appear to show is that around 1890 the number of special verdicts (the column in the Judicial Statistics headed "Acquitted as being insane" until 1892, and "*Special verdict of Guilty but Insane*" thereafter) sharply increased, while the numbers "*found or declared insane before trial*", or from 1893 "*Insane on Arraignment*", sharply declined. These statistics, however, are highly inaccurate, as can be demonstrated by comparing them with the information contained in the annual reports of the Director of Public Prosecutions, who from June 1886 took charge of all prosecutions in capital cases. Since these are statements, prepared by lawyers, of the results of named individual cases, they are more likely to be reliable than the aggregate figures calculated by a Home Office clerk; but their usefulness is marred by their inconsistent terminology. While some offenders are clearly stated to have been found guilty but insane or unfit to plead, others are described simply as "found insane". Some such defendants, e.g. Richardson, Pearsall and Davies in 1888, were certainly found guilty but insane, but others may have been unfit to plead. If all or most of those "found insane" in the 1880s were in fact found guilty but insane, the apparent sharp increase in such verdicts after 1890 virtually disappears. Still other defendants are described in the DPP reports as "insane before trial". In the Judicial Statistics up to 1892 this term is used to head the column which corresponds to the "insane on arraignment" category in subsequent years. In the DPP reports, however, it appears from the further information given (e.g. "removed to Broadmoor"), and from the absence of trial dates, to refer to those who were certified insane while awaiting

trial and transferred to an asylum.

The following table compares the official statistics with the DPP's reports:

TABLE 1

JUDICIAL STATISTICS			DPP RETURNS			
YEAR	Found or declared insane before trial	Acquitted as being insane	Unfit to plead	Ambiguous	Special verdict	Insane before trial
1887	10	6	2	6	5	1
1888	19	2	1	5	12	2
1889	6	2	1	0	5	1
1890	5	18	0	3	19	1
1891	1	14	1	2	17	2
1892	0	13	2	0	11	1
	Insane on Arraignment	Special verdict				
1893	3	12	3	0	14	0
1894	9	6	5	1	7	3
1895	9	12	8	0	13	2
1896	1	8	0	0	10	2
1897	3	16	3	0	16	2
1898	5	11	5	0	11	0
1899	6	9	5	1	9	3
1900	4	18	4	0	18	1
TOTAL	81	147	40	18	167	21
GRAND TOTAL		228			225	246

[Sources: Criminal Statistics; Walker 1968; DPP Annual Returns]

Two points emerge clearly from this table. Firstly, the total of the two columns from the Judicial Statistics (225) is almost equal to the total of the first three columns derived from the DPP returns (223), as would be expected if most or all of those in the "insane before trial" category were certified while on remand. This suggests that the aggregate official figures of criminal insanity taken over several years can be treated as approximately correct.

Secondly, the two sets of figures differ widely up to 1892, converge in 1893-6 and correspond exactly from 1897-1900. This is easily explained. Until 1892 senior Home Office officials paid little attention to the collation of statistics (Radzinowicz and Hood 1986: 101). It was left to a humble supplementary clerk, one George Grosvenor, to extract the figures from the informa-

tion supplied by the police, prisons, and court clerks who used inconsistent formats and even began their statistical years on different dates (Pellew 1982: 53-4). In compiling the insanity statistics Grosvenor would have worked from manuscript returns submitted by Clerks of Assize (Committee on Judicial Statistics 1895: 18), whose terminology was probably as varied and confusing as that employed by the DPP. Add to this the confusion of having to compile a column headed "acquittals" from the returns of verdicts of "guilty but insane", and it is not surprising that the figures are a muddle. In 1892, controversy about whether the statistics showed a rising or falling crime rate led the Home Office to establish a Committee on Judicial Statistics headed by one of its most talented officials, C.E. Troup (Pellew 1982: 53-7). The 1893 Criminal Statistics were the first fruit of the Committee's efforts. Among other reforms, the insanity statistics were given legally correct headings and were based on printed prison calendars, which were presumably more uniform than the old manuscript returns (Committee on Judicial Statistics 1895: 18). Thus by the end of the century more or less complete accuracy had been achieved - although further demonstrably inaccurate figures were published by the Home Office as recently as 1992 (Mackay and Kearns 1994).

Although we cannot rely on figures for specific findings in specific years, the combined figures of special verdicts and insanity on arraignment over decades are likely to be approximately correct, and they show a clear trend:

TABLE 2
MURDER CASES 1861-1910

Decade	Committed	Convicted	% convicted	insane ¹	% insane
1861-70	678	242	35.7	99	14.6
1871-80	646	267	41.3	115	17.8
1881-90	671	281	41.9	154	23.0
1891-1900	599	237	39.6	160	26.7
1900-10	677	292	43.1	232	34.3

[Source: Chadwick (1992: 399) Table 2]

In short, the rate of findings of insanity more than doubled between the 1860s and the

1. i.e. Guilty but Insane or Unfit to Plead

1900s, but without producing any fall in the conviction rate. Thus the rise in findings of insanity was offset by a fall in acquittals, though it is unclear to what extent these two trends are related. What is clear is that the medical view was gaining ground in practice as well as in theory. The remainder of this chapter aims to explain how and why this occurred.

Prisons and magistrates

In the field of civil lunacy law the 1880s and 1890s marked a high point of "legalism", a determination by judges and legislators to curb psychiatric discretion by rigid legal rules (Unsworth 1987; Jones 1993: Ch. 6). It may seem surprising that the same period saw a relaxation of judicial attitudes to insanity in criminal cases. What was most objectionable from a legalistic point of view, however, was not the finding of insanity (either on arraignment or as a special verdict) by a jury, but rather the procedure by which untried prisoners could be transferred to a lunatic asylum on the basis of a certificate of insanity and the Secretary of State's warrant. When this procedure came under attack from the judiciary, the natural consequence was to increase the number of insane defendants coming before the courts.

The attack came in the case of Marshall (1885). The particular point on which Baron Huddleston seized in that case was that the warrant for an alleged murderer's transfer to Broadmoor had been signed by a mere Assistant Under-Secretary of State, rather than the Secretary or Under-Secretary as the Criminal Lunatics Act 1884 required.² But Huddleston's fundamental concern was that the statutory power itself was "contrary to the ordinary constitutional course" (Times 10 Feb. 1885). Even the BMJ (1885) questioned whether Marshall should have been "consigned to the society of criminal lunatics, probably for the term of his natural life, on medical evidence of which nothing is known".³ Such anxieties seemed to be confirmed by the

2. The Home Secretary had in fact made the decision personally, but he accepted that "so solemn a proceeding" ought to have been authorised by his own signature: Sir William Harcourt to Sir A. Liddell, 17 Feb. 1885, in PRO HO 144/148/A38399.

3. The BMJ's attitude was representative of a section of medical opinion which was wary of being seen to interfere with individual liberties without adequate legal backing: see Unsworth (1987: 103-6).

Attorney General's admission that about 40 untried prisoners a year,⁴ including six murderers in the previous three years, were dealt with in this way.

To judge by one of the murder cases disposed of in this way shortly before the Marshall case, there was some justification for Huddleston's concerns. William Norris, awaiting trial for the murder of his children, was certified insane and removed to Broadmoor on the basis of a very brief report by Dr Gover, the Medical Inspector of Prisons, stating that Norris was subject to attacks of mania and impairment of memory and would have been incapable of appreciating the nature and quality of his act. Although the report did not comment on Norris's fitness for trial, or indicate that his removal from a prison was especially urgent, his transfer seems to have been treated as matter of course within the Home Office.⁵ After the outcry over Marshall, however, the Home Secretary issued a Standing Order stating that, especially in cases "of a grave nature...the prisoner's insanity should, if possible, be publicly decided by the verdict of a jury", and that he would authorize such prisoners' transfer only where there were "special reasons" to do so (quoted by Walker 1968: 229). Thereafter, although defendants regarded as obviously insane continued to be sent to Broadmoor without trial,⁶ the Home Office acted only after careful consideration.⁷

The transfer of prisoners to asylums ran into opposition on all sides. County asylum superintendents, as Home Secretary Sir William Harcourt noted, were "not fond of this class of patient".⁸ Ex-prisoners were considered a particularly refractory group (Hearder 1898), and liable to incite trouble amongst other inmates (Lancet 1887). Even in Broadmoor it was feared that relatively honest criminal lunatics would be "contaminated by the degraded habits and

4. Most of these must have been minor offenders who transferred to local asylums, for in 1882 Broadmoor housed only 45 patients who had been certified insane while on remand: Commissioners in Lunacy (1883: 369).

5. PRO: HO 144/529/A36506 (May-June 1884)

6. See for example Ware (1885), where Hawkins J clearly accepted that this had been the appropriate course.

7. See the discussion in PRO: HO 144/272/A59600 (1898) of whether to send for trial a "quite demented" asylum patient charged with the manslaughter of another patient. The eventual decision was that in view of the length of time he would have to await trial, and the fact he would probably be found unfit to plead, it would be best to send him to Broadmoor.

8. PRO: HO 45/9650/A37793 (1884)

conversation of the convict class".⁹ Untried prisoners were particularly unwelcome in Broadmoor because they tended to develop a sense of grievance if they recovered sufficiently to appreciate their legal position.¹⁰ William Norris, the alleged child-killer, was one such patient. In a petition to the Home Secretary he contrasted the government's attitude with the rhetoric used to justify the Boer war:

I have been confined in this asylum for 16 years...and I was sent here without a trial. And I read in the Daily Papers that our Prieminister said that they was fighting for Equal Men's Rights and I aske you for an Englishman's Right Either a trial or my Liberty.¹¹

The prison authorities also saw advantages in avoiding the transfer of insane convicts to hospital. From 1875 to 1896 prisoners in the convict (long-term) prisons who became insane were sent to the invalid prison at Woking, rather than to Broadmoor or a county asylum, for the duration of their sentences (see Wiener 1990: 316-7). Dr Gover, the Medical Inspector, thought that this encouraged them to recover, whereas in an asylum it would be in the convict's "interest not to allow his recovery to be evident" (Commissioners of Prisons 1886: xlv).

Prison doctors were far from eager to certify their charges as insane and were almost obsessively wary of "malingerers" who simulated madness (Sim 1990; Geller *et al.* 1991; Watson 1994); yet even when they were satisfied that a prisoner was genuinely insane they sometimes found the visiting magistrates reluctant to sign the necessary certificate to initiate a transfer.¹² As the medical officer of Bristol Prison complained in 1904, some magistrates seemed to treat their inquiry into a prisoner's sanity (under the Criminal Lunatics Act 1884, s. 2(3)) almost as if it were a trial:

9. [W. Orange], Broadmoor Superintendent's report for 1872, quoted in Commissioners of Prisons (1896: xli).

10. PRO: HO 144/484/X35976 (minute of discussion with the Superintendent of Broadmoor, 1892).

11. Petition dated 23 Nov 1899 in PRO: HO 144/529/A36506. Norris was conditionally discharged in 1901. The "equal rights" Britain claimed to defend were those of non-Boer white settlers in the Transvaal.

12. See Commissioners of Prisons (1884), para. 25 and W. Bevan Lewis's evidence to the Departmental Committee on Prisons (1895), esp. at Q. 9145. Two members of the Visiting Committee and two medical practitioners were required to sign a certificate of insanity under the Criminal Lunatics Act 1884.

in the case of a criminal in prison the rules of legal evidence tend to prevail over those of scientific testimony. Whereas under the latter everything bearing on the case has to be considered, under the former anything decisive of the matter may be ruled out, such as relatives' or prisoners' letters, previous history, a warder's night reports, and medical opinion generally. Thus, if the prisoner is at the moment of inquiry quiet, then he is "sane"; but if noisy and excited in speech and manner, than he is "shamming" unless he is "drunk." The presumption of mal-ingering ... is over them all, whereas as a matter of fact in some cases the only simulation is the artful dissimulation of delusion, to avoid certification and a further indefinite detention. An abortive inquiry of this kind is a very serious matter, as it may in the case of a prisoner awaiting trial prejudice the defence (?) [sic] of insanity.

(Cotton 1905: 106-7)

Magistrates were criticized for being both too reluctant to transfer the insane out of prisons, and too willing to send them there. Dr Gover was convinced that the magistrates, encouraged by their clerks, were cynically using the prisons as a conduit to the lunatic asylums, saving "themselves a great deal of trouble in the way of getting the requisite certificates, etc.",¹³ and throwing the expense of keeping the inmates, as criminal lunatics, on central government instead of the ratepayers.¹⁴ He also thought that medical men outside prisons were reluctant to certify for fear of litigation.¹⁵ Pauper lunatics, however, were hardly likely to sue the doctors who certified them (Molloy 1896; Saunders 1981: 232), and if magistrates were using the prisons as cynically as Gover suggested, it is hard to understand why they were not eager to certify prisoners insane so they could be transferred to asylums. What does seem plausible is Pitcairn's (1897) suggestion that the Metropolitan stipendiary magistrates, who with their heavy workloads could only spend a matter of minutes on each case (Davis 1984), remanded defendants to prison because they did not have time to arrange for their certification under the Lunacy Act. They may also, as Saunders (1981) suggests, have been concerned to maintain a sense of due proportion in sentencing, and have regarded indefinite incarceration in an asylum as an excessive response to

13. Gover, 1889, quoted in Commissioners of Prisons 1894: 26.

14. Gover, Memorandum (13 Nov 1888) in PRO: HO 45/9955/V10698. In an attempt to overcome magisterial reluctance to certify, the Criminal Lunatics Act 1884, s. 10, made prisoners transferred to asylums chargeable to the Treasury (see McConville 1995: 290-1).

15. Evidence to the Departmental Committee on Prisons (1895) Q. 1442.

minor offending.

The Prison Commissioners particularly disapproved of the magistrate's practice of remanding defendants to prison "for observation" of their mental condition. They regretted the abandonment, on grounds of its uncertain legality, of the earlier practice of remanding defendants whose sanity was in doubt to workhouses.¹⁶ In their report for 1887-8 the Commissioners of complained that remands to prison for observation were "a great deal too common" (Commissioners of Prisons 1888: 25). At this stage the largest numbers of remands for observation were to some of the large provincial prisons: Birmingham, Bristol, Nottingham and Strangeways. The following year, the number of remands "for observation" to Holloway, which had become the main remand prison for Middlesex in 1886, increased a hundredfold, from four to 401.

In response to pressure from the Commissioners, the Home Office took action to discourage the imprisonment of the insane. A circular to magistrates dated November 1889 advised them that it was "unjustifiable that persons suspected of insanity should be sentenced to imprisonment in order that the prison may be used as a place of observation". But the Home Secretary also "strongly urge[d] on the magistrates that it is their duty to obtain, in all doubtful cases, evidence as to the mental condition of prisoners." At the same time a circular was sent to Police Authorities, telling them that "In the case of prisoners who appear to be suffering from mental derangement, evidence as to their sanity should be furnished before the cases are dealt with by the magistrates" (Home Office 1889: 794). When such evidence was forthcoming, the magistrates were advised that

In cases of serious crime it may be necessary to commit for trial persons supposed to be insane, in order that the question of their sanity may be decided by the verdict of a Jury. But where the offence is less serious, it is almost always open to Justices to dismiss the charge, and to deal with the prisoner as an ordinary lunatic, either by handing him over to the care of his friends, or by sending him as a pauper lunatic to an asylum.

(*ibid*: 793)

16. See Commissioners of Prisons (1884-5: 64), regretting that this practice is no longer considered legal; and *Lancet* (1883, 1885a), condemning the practice and arguing that remands to prison would be preferable. Anderson (1987: 389-90) points out that as early as the 1860s London magistrates were remanding some defendants for observation at the Clerkenwell House of Detention, a policy she attributes to the *Lancet's* criticisms of the care of the insane in workhouses.

This was a reference to the Summary Jurisdiction Act 1879, s. 16, under which magistrates could dismiss a charge where they thought "that though the charge is proved the offence was in the particular circumstances of the case of so trifling a nature that it is inexpedient to inflict punishment." Not until 1907 was the defendant's mental condition made a statutory ground for dismissal.¹⁷

The Home Office also responded to Prison Commission pressure by extending to all remand prisoners the rule laid down after the Marshall case that transfers to asylums would only be authorized in cases of extreme urgency.¹⁸ This served to discourage the type of action taken by Mr Mead, one of the London police (stipendiary) magistrates, in the case of John Linkson (1890). Mead remanded Linkson, who was charged with indecent exposure, to Holloway specifically for the purpose of having him examined by the Visiting Committee with a view to certification as a criminal lunatic. In Mead's view this was the only appropriate way to deal with a defendant who was unfit to stand trial for a summary offence.¹⁹ Edward Leigh Pemberton, the Assistant Under-Secretary (Legal) at the Home Office, reminded Mead that it had been "the invariable practice of the Metropolitan Police Magistrates ... to dispose of the prisoner either by handing him over to his friends or by sending him to a workhouse with a view to subsequent removal to an asylum: and this course has been found to work well, and was recommended by the Secretary of State for general adoption by Magistrates" in his 1889 Circular.²⁰ Mead accepted that where a prisoner had been acquitted of a summary offence on the ground of his insanity there could be no objection to dealing with him as a pauper lunatic:

Here, however, he may sufficiently recover to enable him to be tried, and he may then fail to prove that he was so insane at the time of the alleged offence as to entitle him to be acquitted...[I]f detained in a county lunatic asylum the authorities

17. Probation of Offenders Act 1907 (7 Edw. VII Ch. 17), s. 1 (1).

18. Letter to Sir Edmund Du Cane, Chair of the Prison Commission, 27 Nov 1889, in PRO: HO 45/9955/V10698/5. See Prison Standing Order 401, in PRO: PCOM 7/358.

19. The provisions for detention at Her Majesty's pleasure under the Criminal Lunatics Act 1800 did not apply to such offences, and neither did the Summary Jurisdiction Act 1879, since the charge had not been proved.

20. Letter dated 2 Jun. 1890, in PRO: HO 144/478/X28209.

would have no cognizance of such circumstances and when sufficiently sane he would be turned loose upon society free from any punishment for his serious misconduct.²¹

Clearly Mead, who though new to the bench was an authority on criminal procedure,²² thought insanity should be treated as a common law defence and not merely as a ground for discretionary dismissal of charges, and that legally responsible lunatics should be punished for summary offences as well as for more serious crimes. He also argued that if sending suspected lunatics to the workhouse had ever been legal, it was no longer so in the light of the Lunacy Act 1890, s. 21 which (re-enacting legislation of 1889) allowed such committals only where the conditions for making a summary order for reception to an asylum were satisfied.²³

Although senior Home Office officials shared the Prison Commission's disapproval of sending people to prison (either on remand or as a sentence) with a view to their possible transfer to asylums, they regarded the practice of remanding defendants so that a prison doctor could report to the court on their mental condition as one "which neither can be, nor ought to be, checked."²⁴ The use of such remands, particularly to Holloway, gradually increased during the 1890s.²⁵ At this time the Prison Commissioners were facing a campaign of press criticism (McConville 1995, Ch. 13), one element of which, advanced most effectively in an article by the prison chaplain W.D. Morrison (1894), was the claim that high rates of insanity in prison were attributable to the extremely harsh prison regimes introduced in the 1860s and '70s. Du Cane and Gover were clearly stung by Morrison's criticism,²⁶ and complained that remands for

21. *ibid.*, T. Mead to Henry Matthews (Home Secretary) 9 June 1890.

22. Mead, a barrister and one of the editors of *Archbold's Quarter Sessions*, was appointed a police magistrate in 1889 (*Justice of the Peace* 1889: 520).

23. On the interpretation of s. 21 see Greig and Gattie (1915: 181).

24. Minute by C.E. Troup with draft of above letter, annotated "I agree" by Godfrey Lushington, Permanent Under-Secretary.

25. See the lists of prisoners found insane in the Prison Commission Reports, 1890-1900; and Pitcairn (1897)

26. Gover responded directly to Morrison's article in *Commissioners of Prisons* (1894: 89). His successor, Herbert Smalley, dealt with similar criticisms in his first two reports (*ibid.* 1897: 19; 1898a: 68-9).

observation were "used to create an altogether false impression, by attributing the large proportion of cases of insanity to the effects of prison discipline" (Commissioners of Prisons 1894: 26). Morrison (1894: 468) acknowledged that many prisoners were already insane when they arrived in prison, but claimed that this reflected the "evil effects of former periods of imprisonment" (see also Molloy 1896: 160).

The Gladstone Committee did not endorse Morrison's arguments but it did question whether some of the larger prisons, especially Holloway, were equipped "to give the detailed and prolonged attention to individual prisoners which alone can secure the sifting out of such as require special treatment" (Departmental Committee 1895: 34). The Committee's recommendation that all new medical officers should be required to show that they had given special attention to lunacy was received skeptically by Gover (who suggested that tuberculosis was a more pressing problem),²⁷ but was nevertheless implemented; and additional Deputy Medical Officers were appointed at Holloway, Liverpool and Manchester to assist in the work of medical observation (Commissioners of Prisons 1898b). The new Chairman of the Commission, Evelyn Ruggles-Brise, and the new Medical Inspector, Herbert Smalley, no longer protested in their annual reports about the use of prisons for observation, but instead relegated the numbers of prisoners remanded for this purpose to a footnote on the ground that their insanity was self-evidently not produced by imprisonment.²⁸ As Anderson (1987: 391) remarks, some of the new recruits were eager to develop their interest in psychological medicine within a prison setting, and were encouraged to do so by the new Commissioners. One of the younger generation of prison doctors, J.J. Pitcairn, was particularly instrumental in developing Holloway as "a species of filtering-bed to retain and segregate those found to be mentally deficient" (Pitcairn 1897: 59).

According to Pitcairn (1897), from April 1890 to March 1896 a total of 2,862 prisoners, including 848 women, were remanded to Holloway for observation and an additional 3,061 (1,277 of them women) were treated as "observation cases" on the prison's own initiative. Nearly half of those observed under one or other of these procedures were charged with attempted sui-

27. Gover, Memorandum on the Committee's recommendations, PRO: HO 45/10025/ A56902/4 (1895).

28. Commissioners of Prisons (1897: 9, 90) and subsequent reports

cide; of these, almost exactly half were women. Holloway's "filtering" process resulted in 84 prisoners (61 men and 23 women) being found guilty but insane or unfit to plead at the quarter sessions or assizes and 1,434 (1,047 men and 387 women) being reported to the magistrates to be insane (*ibid*: 62).

On receiving such a report, the magistrates usually dismissed the charge but then sent the defendant not to the asylum but to the workhouse. Under the Lunacy Act 1890, s. 24, the workhouse medical officer then had 14 days to certify whether the pauper was a lunatic, and if so whether he or she could be cared for in the workhouse (which medical officers rarely considered appropriate: Cochrane 1985: 252-3) or should be sent to an asylum. According to James Scott, medical officer at Holloway and then at Brixton, magistrates saw committal to an asylum as "a strong step", and in the absence of obvious delusions or incoherence preferred a temporary (and inexpensive) committal to a workhouse (Royal Commission 1908, Qq. 4936-8). Scott stated that many of those admitted were found sane when the 14 days expired.

Holmes (1899) an experienced Police Court missionary,²⁹ regarded observation in the controlled environment of a prison as quite inadequate to reveal the insanity of many of the prisoners observed. The "great bulk of these people", Holmes complained, "are set at liberty" (1899: 580). Anderson (1987: 396) concludes that "a mere handful" of the thousands of would-be suicides subjected to psychiatric observation ended up in asylums.

Nevertheless, the prison medical service had begun to establish itself as one of the major agencies for investigating the mental condition of criminals. And the impetus for this development had come not so much from within the prison system as from a magistracy which was very wary of adopting a medical view of crime.

Unfitness to Plead

The "old constitutional way of doing business"³⁰ where prisoners awaiting trial were considered insane was to bring them to court so that a jury could determine whether they were fit to plead. A

29. These "missionaries" undertook voluntary work with defendants at magistrates' courts; the probation system developed from their work.

30. Patteson J in *Dwerryhouse* (1847: 447).

finding of unfitness left the prisoner's guilt or innocence unresolved but at least meant that the justification for denying him or her a trial had been tested by a jury.

Like the certification of untried prisoners, unfitness to plead involved a conflict between administrative expediency and the principle that "the trial for a crime should take place in open Court before 12 men, instead of being left to the consideration of any Statesman" (Day J in Cooper, 1887). Pitt-Lewis et al. (1895: 166) considered the procedure a useful way of detaining "obviously and incontestably insane" defendants as criminal lunatics "without the waste of public time which a trial of the case on its merits would necessitate", but they also found the practice "on constitutional grounds, not quite unexceptionable. For although it is not, perhaps, very probable...such a procedure might possibly, in troubled times, be perverted into a convenient means of getting a troublesome political opponent out of the way." Dr Nicolson, Orange's successor at Broadmoor, urged his colleagues "to be extremely careful that, in trying to befriend the prisoner, we do not do him a gross injustice by withdrawing from him his first and most essential right - the privilege of pleading 'Not guilty.'" (Nicolson 1896.) Orange (1892b), on the other hand, thought the procedure ought to be more widely used - one reason being that it withdrew the prisoner's privilege of pleading "Guilty" and pre-empting an insanity defence.³¹ Mercier showed scant regard for legal niceties in his comment on Peat (1901), where the prisoner seems to have presented his own case against an unfitness finding quite cogently, but to no avail: "It is rare for the trial of so sensible a lunatic to be cut short at this early stage. It would save a great deal of the valuable time of the courts if this plan were more often adopted." As Mercier himself put it on another occasion: "Such a course may be expedient, but it seems a queer way of safeguarding the interests of the prisoner" (Mercier 1905b: 415).

There is at least one case where such a plan was adopted, allegedly to safeguard the inter-

31. Judges were usually reluctant to accept guilty pleas in murder cases (Chadwick 1992: 88-9; but cf. Cullum, 1888) and would sometimes cajole a possibly insane prisoner into pleading "Not guilty" (e.g. Prince, 1898), or allow counsel to present an insanity defence despite his client's objections (e.g. Peterson, 1898). On the legality of the latter practice see Renton (1892a); Pearce (1840). In less serious cases the defendant might be imprisoned "for his own protection" (Taylor, 1891) or released to the care of a relative (Crane, 1888). The Home Office considered it preferable to impose a short prison sentence, with the possibility of certification, rather than to certify an unsentenced prisoner (PRO: HO 144/523/X74976, 1899).

ests of the prisoner but also, perhaps, to protect other and more powerful interests.³² John Nyland, a 42-year old journalist, was privately prosecuted by the Daily Telegraph for threatening to kill its editor (what he had actually written was: "I will and shall have no hesitation to exercise the power which my God has given me towards scoundrels and moral murderers.") Since both prosecution and defence counsel agreed that Nyland was unfit to plead, Nyland himself cross-examined the medical witnesses, and induced one of them to repeat the allegations which he, Nyland, had made against the Daily Telegraph. Nyland's contention that the letter was not meant as a threat to kill was taken by the witness as an indication that he "did not seem to realize the gravity of the charge" and was therefore unfit to plead. Nyland's counsel and the other medical witness, Dr Scott of Holloway prison, gave the jury the impression that if he were found unfit to plead he would be released to join his relatives in Australia. Wills J told the jury that "He could not help expressing the utmost sympathy for this unhappy gentleman, because he was a gentleman, and had behaved as a gentleman. But there was an enormous disproportion between the threats in the letters and the provocation caused by the articles" which the Telegraph had published about him. The jury found Nyland unfit to plead but added a rider criticising the Telegraph's articles, which was endorsed by the judge.

Insane Nyland may have been, but how could he be brought within the legal definition of unfitness to plead? Judges were "not embarrassed by any rigid formula" in directing the jury (MPA 1896: 864). Wills J said that the question was whether Nyland was able "properly to defend himself or give instructions to his counsel". The ability to instruct counsel was not mentioned in Pritchard, and seems to have been introduced as a test in Davies (1853; see Grubin 1993). Some judges and counsel stuck more pedantically to the Pritchard (1836) criteria (see above: 4). In at least two cases the issue of whether a deaf-mute could understand his right to challenge jurors was raised,³³ though in practice this right was almost never exercised (Chadwick 1992: 89-90).

32. Orange (1892b) gives other examples of a broad view being taken, one of which, Mauerberger (1887) bears striking similarities to the case discussed here.

33. Lambert (Ipswich Quarter Sessions 1892), unidentified press cutting in PRO: HO 144/145/A38210; Williams (S. Wales Assizes 1895), judge's notes in PRO: HO 144/263/A56718.

Uneducated deaf-mutes were classed by medical authorities as imbeciles (Mendel 1892; Savage 1892) or even idiots (Hyslop 1895: 436),³⁴ but Chadwick (1992: 89) is wrong in assuming that when found insane on arraignment they faced prolonged psychiatric incarceration. Edward Haines and Mary Ann Warren, both found unfit to plead to petty charges of theft, were kept in prison for a month and then discharged. In Haines' cases it took some time for the Home Office to reach a decision, but the Home Secretary set the term of a month for Warren, presumably as a punishment. Richard Thompson (1888) was charged with shooting with intent to cause grievous bodily harm. The trial judge (Pollock B.) thought that although his understanding was very limited he knew right from wrong and deserved to be punished. After three months in York prison he was discharged to the care of his brother, who undertook to keep him away from firearms. Noah Hughes (1896), who was charged with stealing a colt, presented a quandary. According to the local police inspector he had "given much trouble, his conduct being very violent"; but this seemed to be the result of bad temper rather than insanity. "It is difficult to know what to do with him", a Home Office official minuted: "having been found insane on arraignment he can hardly be sent to prison; he does not seem mad enough for an asylum; and it would not seem proper, after this report, to turn him loose." After three months in the local asylum he was discharged to the care of his mother.

All these defendants were dealt with on the assumption that they were guilty. In the case of John Williams (1895), the trial judge thought that although "some impropriety" had probably taken place between the collier and the seven young girls he was alleged to have indecently assaulted, he would "very likely have been acquitted" had he been fit to plead. The Home Secretary, Herbert Asquith, eventually decided that he should be discharged, but if there were any more such incidents "it must be a question whether he should go to Broadmoor."

An insane defendant who was deemed to have recovered sufficiently could be remitted to stand trial. In the case of William Ruffles, whose insanity was attributed to a head injury sustained in the course of his arrest for burglary, five months in an asylum was evidently considered

34. "Idiocy" was the lowest grade of "mental deficiency", below "imbecility". Recently Sacks (1989: 19) has written that "The languageless deaf may well be as if imbecilic, and in a particularly cruel way," lacking the power of propositional thought as well as speech.

sufficient punishment. Having recovered and been convicted he was sentenced to one day's imprisonment.

Most hearings on unfitness to plead seem to have been quick and uncontentious affairs. According to Pitt-Lewis et al. (1895: 166) it was usually the prison authorities who arranged for the issue to be raised,³⁵ and the prison surgeon and other medical witnesses were rarely cross-examined. A few cases, however, aroused such controversy that the Journal of Mental Science described the law as being "in a condition of the most hopeless confusion" (JMS 1895: 322). It was not so much the substantive law that was in confusion, however, as the law of evidence.

Evidence and Procedure

Although there was no legal requirement for medical evidence in order to establish that a defendant was insane (Dart, 1878) or unfit to plead (Goode, 1837), it was rare for either issue to be raised without medical evidence, and even rarer for it to be raised successfully.³⁶ Three cases in 1887-8 aroused particular controversy concerning the role of the expert witness. In Cooper (1887) and Hitchens (1888), Field J sought rigidly to apply the "ultimate issue rule" to evidence of unfitness to plead and insanity respectively. Day J took the same line on the same day as the Hitchens trial in Taylor (1888), as well as in the earlier case of Gouldstone (1883).

The "ultimate issue" rule applied to all expert witnesses but originated in a much earlier insanity case, Wright (1821).³⁷ In Hitchens, Field J laid it down as follows:

I am determined not to allow any medical gentlemen, however eminent, to be

35. As Walker (1968: 266) observes, "the key to this escape route for the insane offender has been in the hands of the prison doctor ever since such an official came into existence".

36. Defendants who were found insane without medical evidence included Dodwell (1878), Hough (1898) and Dunstan (1899), In Schneider (1898) and Wickham (1901), such pleas - presumably made in desperation as no other defence was possible - were rejected.

37. See Wigmore (1978: § 1921 n. 1); Jones (1994: 104). Note, however, that what "several of the judges doubted" in Wright was "whether the witness could be asked his opinion on the very point which the jury had to decide, viz., whether, from the other testimony given in the case, the act as to which the prisoner was charged was, in his opinion, one of insanity?" (Russ. & Ry. at 458): not whether an expert could express such an opinion on the basis of his own observations (cf. Martin v. Johnstone, 1856). The judges in McNaughtan's case confirmed that the question whether the evidence in court showed insanity was strictly inadmissible, though it might be allowed where the facts were not in dispute (an exception disapproved in Frances, 1849). It was presumably McNaughtan which Day J had in mind when he (erroneously) told counsel in Hitchens that he was bound by a ruling of the House of Lords.

substituted for the jury. When trial by medical men comes into vogue, well and good; but so long as trial by jury is the law of the land, I will not allow a medical man to be substituted for the jury. The medical men are not to give their opinions; they are to give the facts upon which their opinions as to the state of the prisoner's mind are founded, and on those facts the jury are just as competent to come to a conclusion as the expert witnesses.

(Quoted by Mercier, one of the witnesses, in BMA 1894: 351.)

The rule has been described by Jones (1994: 104-6) as a central plank in the law's strategy to limit the role of the expert. Yet by the late 1880s it was, in practice, honoured largely in the breach where psychiatric testimony was concerned. The leading work on lunacy law (Pope 1890: 426) described direct questions to a medical witness as to a party's sanity as "by no means uncommon", though not sanctioned by any authority (see also Renton 1892). L. Forbes Winslow, one of the witnesses in the Taylor case, had just given evidence in another trial (Richardson, 1888) where the medical witnesses were all asked whether the defendant was of sound mind.³⁸ These cases coincided almost exactly with the trial of Pearsall (see below) before Coleridge CJ, where according to one of the medical witnesses "We were all asked by the Judge for our opinions as to the prisoner's state of mind" (Richards 1888). According to Mercier, Coleridge CJ had paid equally little heed to the rule in Maclean (1882), telling a witness: "What I want to hear from you is not, strictly speaking, what passed between you and [the prisoner]. You are to tell us, as a man of great science and experience, what is your scientific conclusion" (BMA 1894: 352).

Even in Taylor and Cooper, the application of the rule was not entirely consistent. In both cases the medical witnesses were questioned about the defendants' ability to understand the proceedings and instruct counsel - questions which were closer to the "ultimate issue" of fitness to plead than the bare assertion that the defendant was insane. In Cooper Field J insisted that the local asylum superintendent adduce the facts on which he based his opinion that the defendant (a curate who had cut his vicar's throat) was unable to instruct counsel, *but that he must confine himself to the brief conversation he had had with Cooper immediately before the trial*.³⁹ He

38. Richardson (1888): see Winslow (1888, 1910).

39. A similar restriction was imposed by Day J in Gouldstone (1883).

would not accept counsel's argument that "an impression produced a month ago at an hour's interview can be confirmed afterwards at a two minutes' interview." But although Cooper was duly found fit to plead, we shall see later that the judge's triumph was short-lived. Taylor (who had killed his own child and a police officer) was similarly found fit to plead but successfully pleaded insanity. And Hitchens was found guilty but insane despite a summing-up strongly in favour of conviction.

The rulings in these cases continued to rankle with alienists for many years, and figured prominently in the MPA and BMA's discussions of 1894, but they marked virtually the "last stand" of the ultimate issue rule in insanity cases.⁴⁰ In the 1890s medical men were regularly asked their opinions on the defendant's understanding of the proceedings or knowledge of right and wrong. The effect, particularly in cases of unfitness to plead, could be very close to the "trial by medical men" that Field, J. had feared. For example, when Richard Hallsay was indicted in 1895 for committing an act of indecency, Thomas Bond FRCS was called to give his opinion that the defendant was "quite irresponsible for his actions, and not fit to plead to the indictment". After another two distinguished alienists (who had been consulted by Hallsay's son) gave evidence to the same effect, the Recorder said he did not think defending counsel need "carry the case any further", and the jury duly found Hallsay unfit to plead.

Even Day, J., in Allcock (1896), allowed the local asylum superintendent to testify that "He considered the prisoner to be an insane person" and "had very grave doubts whether the prisoner knew he was doing something wrong, something criminal, when he stabbed his wife," although he would not allow a direct question whether the prisoner "was in a fit state of mind to know right from wrong". In his summing-up, Day told the jury that

he did not attach the peculiar value to purely medical evidence that some people did. He always thought that madness was a thing easily detected by those who had opportunities of associating with the person affected, and...that the best evidence of madness was the testimony of those among who the person had lived...and he should take the evidence of a warder, say, who had had him in charge, as being quite as valuable as a gaol surgeon.

40. An attempt to resurrect the rule was rejected by the Court of Criminal Appeal in Holmes (1953).

But this was by then an idiosyncratic view, which called forth one of Mercier's most stinging commentaries: "it is to all good citizens a matter of regret when the administrator of justice...goes out of his way to make himself ridiculous even to a section of Her Majesty's subjects" (JMS 43: 422) - though not, apparently, to the jury who found Allcock guilty.⁴¹

The growing receptiveness of the courts to expert psychiatric evidence can largely be attributed to a change in the expert's role within the adversarial system. As noted above (p. 9), it was defence counsel who, early in the century, chiefly took the initiative in promoting psychiatric evidence. Their association with the defence left the alienists open to the accusation of being "hired advocates"⁴² rather than impartial men of science. It also meant that if a defendant was poor or friendless, medical evidence might not be forthcoming (MPA 1883; Bucknill 1884). In 1884, however, Home Secretary Sir William Harcourt became irritated that it was left to his department to gather evidence of insanity so that George Baldwin, convicted of an apparently motiveless murder, could be certified insane and sent to Broadmoor.⁴³ Harcourt was already dissatisfied with the work of the first Director of Public Prosecutions, Sir John Maule (see Edwards 1964: 368; Uglow 1984: 329), and Maule's failure to intervene in the case was blamed for the lack of medical evidence at the trial. With effect from June 1886, the DPP's post was merged with that of the Treasury Solicitor, and he was required to supervise the prosecution of all capital cases and ensure that when there was any suggestion of insanity medical evidence was placed before the court.⁴⁴

As Orange (1892c) explained, the DPP's new role extended in practice to other serious cases as well as murder. In Old Bailey cases the DPP tended to rely on prison medical officers (particularly Dr James Scott of Holloway), but at the assizes the usual practice was to ask the local asylum superintendent to examine the prisoner; sometimes a second medical expert would

41. As Mercier admitted the evidence of insanity was not "very cogent", and after a further medical examination Allcock was hanged (BMJ 1897, 1: 307).

42. See the prosecutor's comments in Atkinson (1858), bitterly criticised by the BMJ (1858). See also Mohr (1993: 199); Jones (1994: 98).

43. PRO: HO 144/130/A34231 (1884).

44. Sir Henry James (Attorney-General), parliamentary answer, 1884, quoted by Orange (1892c); Prosecution of Offences Regulations 1885 (HC 146) quoted by Edwards (1964: 379).

be called in as well.⁴⁵ The DPP or his agent (a local solicitor in the assize town) would supply the experts with information about the defendant's antecedents, and they would also be furnished with the depositions taken from witnesses by the magistrates or coroner. If the report was favourable to the accused prosecuting counsel might leave it to the defence to call them (e.g. Holland, 1896) but commonly would himself urge the jury to find the prisoner "guilty but insane",⁴⁶ until this practice was disapproved by a meeting of the judges in about 1903.⁴⁷ Occasionally the prosecution would take this course in circumstances where they could easily have argued that the defendant was not within the M'Naughtan rules (e.g. Smith, 1894; Truett, 1898). Aggressive cross-examination by the prosecution of the experts instructed by Treasury, as in Bligh (1886), was rare.

It seems the Treasury's lawyers were expected to play something of inquisitorial role in such cases, rather than secure a conviction wherever possible. As Hawkins J put it in a letter welcoming the new arrangements, "to arrive at the truth is ... the sole end of a Crown Prosecution," and that included the medical truth that might establish the accused's irresponsibility.⁴⁸ Prosecuting counsel in Canham (1901), according to a defence witness, "showed great willingness that any facts which could weigh with the jury in the prisoner's favour should be brought forward", and called evidence to prove that Canham's sister once suffered from puerperal insanity (P. Smith 1901: 538-9). Wiglesworth (1901), an experienced Treasury witness "always found the Prosecution very fair and open-minded in these cases, and never anxious to press the case against the prisoner if there were a reasonable presumption of irresponsibility. So that in my

45. Orange (1892c); PRO: HO 144/236/A51751 (1890).

46. e.g. Carter (1894); Jackson (1894); Holbrook (1898); Curry (1901); Holmes (1901); Neville (1901); Pritchard (1901).

47. The earliest reference I can find to this meeting is an unnamed case reported in the Lancet (1906b), where Jelf J reportedly said that the judges disapproved of the growing practice of the Treasury offering evidence to rebut the insanity defence. In Oliver Smith (1910), Alverstone CJ referred to a meeting "seven or eight years ago" at which "All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel". The meeting may have been a response to the series of cases in 1901: see previous note. The CCA in Smith declined to give any guidance as to the procedure to be followed in rebutting an insanity defence.

48. Letter to Sir W. Harcourt, 28 Jan. 1884, in PRO: HO 144/130/A34231.

opinion the chief ground for agitation [for legal reform] is cut from under us" .

The apparent neutrality of the medical witness was greatly enhanced by these arrangements, as the following exchange from the trial of Terry (1890) illustrates:

[Defence counsel:] You come to this question perfectly unbiased? [Witness:] Most decidedly. I come, as it were, from the other side, from the Treasury.

The Judge: Not from the other side but in the interests of justice. Those who sent you wish you to say nothing but the truth.

In contrast to the position of pathologists and toxicologists as described by Jones (1994, Ch. 5), the Crown did not rely solely on a small elite of experts (although a few trusted experts, such as the alienist Dr Edgar Sheppard and the eminent neurologist Henry Charlton Bastian, were called on in a number of particularly difficult cases). Nor were the Treasury experts breaking any "gentleman's agreement" (Jones 1994: 86) if they gave evidence favourable to the defence. But while provincial asylum superintendents were within the charmed circle of recognized medical experts, a maverick like L. Forbes Winslow, a private asylum owner who intervened in many controversial cases, was firmly excluded. In his memoirs, Winslow (1910: 89-92) complained bitterly of the preferential treatment given to Treasury witnesses.

When expert witnesses disagreed with one another's views, other skills besides medical ones were called for. Summing up in Barker (1893), Vaughan Williams J commented that Dr Lindsey, the defence's expert, might be a good judge of insanity, but "he was not a first-rate witness, not a good arguer....He was not an advocate, and did not make the most of the things he had to say". By contrast, the Treasury's expert, Dr Bastian, "was skilled in the matter of fence." The judge thought this was a reason why they should not attach too much weight to either opinion, but Bastian's view prevailed.⁴⁹

A particularly embarrassing case for the medical profession arose in 1894 when J.A. Campbell, superintendent of the Carlisle Lunatic Asylum, was charged with having carnal knowledge of a female patient (a misdemeanour punishable by two years' hard labour under the Lunacy Act 1890, s. 324). Campbell's medical subordinates considered him sane but given to

49. Lincolnshire Chronicle 14 Jul. 1893, in PRO: HO 144/250/A55030. Barker, whose conviction caused the judge "some anxiety", as he admitted to the Home Secretary, was certified insane and reprieved.

excessive drinking, while a number of his distinguished colleagues took his grandiose claims and eccentric behaviour for possible symptoms of general paralysis of the insane (the condition later recognized as tertiary syphilis). Although Campbell's insanity was accepted by the jury, an editorial in the BMJ (1898b) attacked the "unscientific" character of the McNaughtan Rules and argued that defendants in such cases should be examined by an impartial panel of experts on behalf of the court. Mercier (1898a) criticized the editorial for encouraging "medical men to dabble their amateur hands in legal procedure." This elicited a letter from T.S. Clouston (1898), Scotland's leading alienist and a witness for Campbell's defence, arguing that medical men had every right to urge procedural reforms when their reputation was at stake: "The present custom - it cannot be called a 'procedure' at all - simply drives us into advocacy rather than evidence....It lowers our scientific, and even our ethical status in the eyes of the lawyers, and it weakens our status in the public estimation." In reply, Mercier (1898b) pointed out that public controversy was a normal feature of professional and scientific life, and suggested that "reticence, moderation and fairness on the part of the witnesses" was the way to avoid any appearance of partisanship.

The idea of a court-appointed expert assessor in some form enjoyed a measure of legal as well as medical support (Renton 1892; Pitt-Lewis et al. 1894). The criminologist Havelock Ellis (1901: 359-60) and the alienist T. Claye Shaw (1906) wanted questions of sanity to be determined by a commission of experts whose decisions would be binding on the courts. Renton (1892) and the Lancet (1869, 1898) saw the use of expert assessors in the Admiralty court as a precedent for a more rational system. Bucknill (1884) wanted expert examiners appointed by the court and their cross-examination controlled by the judge. None of these proposals came to anything. On the other hand English alienists could take some satisfaction in contrasting English procedures with those across the Atlantic. The gruelling battle of the experts in the New York cause célèbre of Harry K. Thaw (a millionaire tried twice in 1907-8 for shooting dead a man his wife had accused of rape: see Langford 1962), with its 39-page hypothetical questions, had no parallel in England (Mercier 1908).⁵⁰

50. Contrary to the impression given by Jones (1994: 110-3), who in discussing the popularity of hypothetical questions uncharacteristically fails to distinguish between English and US experience.

"Guilty but Insane"

Judges in the 1880s appeared to be sharply divided about the McNaughtan rules. While Stephen J put into practice the views he articulated in his History (see Davies, 1881; Burt, 1885; Davis, 1888), some other judges, perhaps influenced by the doubts he had cast on the authority of the Rules, went further than he did in criticising them. Kay J in Gill (1883) rejected McNaughtan as the sole test and left the issue of uncontrollable impulse to the jury. When prosecuting counsel in Brocklehurst (1884) began to address the jury on the prisoner's knowledge that his wounding of his wife was wrong, Cave J interrupted: "No; the question is whether he was insane at the time; and if a man is suffering from a delusion that his wife is unfaithful, and he attacks her with a scraper in consequence, it is as clear as anything can be that the man is mad."⁵¹ Hawkins J, in his charge to the Shrewsbury Grand Jury in 1885, used the case of Ware (1885), an asylum inmate who had been transferred to Broadmoor after being charged with the murder of a fellow patient, to highlight the artificiality of the McNaughtan Rules. Ware had clearly understood that he was killing a man and that this was a punishable act, "and yet no jury would say that such a man ... should be held responsible". In Pearsall (1888) Lord Coleridge CJ described McNaughtan as "an old authority, which by the light of modern science was altogether unsound and wrong" and "not incapable of being interpreted so as to do terrible injustice". Despite his admonition to the jury not to "stretch" the law, and a confession which could hardly have been more explicit in its acknowledgement of the nature and wrongness of the act, they had little difficulty in returning a special verdict on a 78-year old man who stabbed his wife while in a state of "general mental enfeeblement".⁵²

Other judges took a very different view. In the case of Hitchens, tried on the same day as Pearsall, Field J not only took a strict view of the evidence but summed up strongly in favour of

51. The authority he had in mind was presumably Kenyon CJ's judgment in Hadfield (1800)

52. All of these judicial dicta were reported in local newspapers and became more widely known through the work of the retired Broadmoor superintendent Orange (1892a). As to the reliability of such reports, the newspaper historian Michael Harris (1992: 110-11) writes that press coverage of the Victorian courts had "a semi-formal status as a public record" and "seems to have been reasonably accurate." The Public Record Office files on individual cases commonly contain both local or national newspaper reports and the judges' notes: comparison of these reveals few significant discrepancies.

conviction of a defendant whom medical men regarded as obviously mad (see below). The cases of Gouldstone and Cole in 1883 also attracted strong medical criticism. Gouldstone had killed his five children to save them from poverty. To an "enlightened" lawyer like Willoughby (1890) this was an obviously insane act, but after a trial in which the medical witnesses were hamstrung by Day J's interpretation of the law of evidence, he was convicted. Cole, after accusing his wife of hiding men under the floorboards and in the cupboard in order to poison him, picked up his three-year-old son by the legs and swung his head against the wall, killing him. He then went out and told the first man he met, "I have murdered my child" (Tuke and Savage, 1883: 20; BMJ, 1883: 830). Sentencing Cole to death, Denman J told him: "I cannot entertain a doubt that ...you knew what you were doing, and you knew that you acted contrary to the law of this country, and that you acted under the influence of passion, which had got possession of your mind from want of sufficient control" (BMJ 1883: 830). Like Gouldstone, however, Cole was reprieved.

Cases such as Cole and Brocklehurst where working-class men attacked their wives or children⁵³ under the supposed influence of delusions produced strikingly inconsistent decisions. Robert Bright had told a doctor six days before he attacked his wife in 1888 that she "had been taking chemicals to enclose herself with other men...that when he went out he saw men standing about the street corners and he had the idea that they were waiting for an opportunity to come to his wife." At the Old Bailey Charles J ruled that there was no evidence of insanity to go to the jury - which turned out to be just as well for Bright, who was convicted of causing grievous bodily harm but not of attempted murder, and sentenced to nine months' hard labour. But at two murder trials at the same court in the same year (Brown and Latham), different judges readily accepted delusional jealousy as evidence of insanity. Charles Latham "said that men came about his place like so many cats", observed Hawkins J - "I think that is a view that no sane man could hold."⁵⁴ Judicial and middle-class attitudes towards marital violence had become much less tolerant than they had been in the early Victorian era, when juries were thought reluctant to convict for wife-murder (Tomes 1978; Clark 1992; Doggett 1992). But while such violence

53. On child-killing see below, Ch. 7.

54. The wife-killers Burt (1885) and Davies (1888) both benefited from Stephen J's broad view of the Rules; other judges were equally generous to Weston (1895) and Flower (1899).

could be seen as a disgraceful failure of self-control, the later Victorians seem to have more readily viewed as abnormal behaviour what might earlier have been seen as typical working-class brutality (cf. Chadwick 1992: 243, 259).

Despite such inconsistent rulings, legal and medical commentators of the 1890s were agreed that in general the interpretation of the law was becoming more liberal.⁵⁵ In 1890, the lunacy law expert Wood Renton claimed that a "silent revolution" had taken place in both civil and criminal tests of mental incapacity: "every barrister who has gone on circuit knows that the 'rules in MacNaghten's case are, avowedly, manipulated by Judges, and, if need be, defied by Juries" (Renton 1890: 317, 318).

As Pitt-Lewis, Hawke and Smith (1895: 218) observed, an "epileptic impulse" would almost invariably be accepted as a defence if it could be satisfactorily proved. Where a crime lacked apparent motive, the judge and jury might be ready to accept the theory advanced by Dr Bastian in Procter (1888) that "a person may have tendency to epilepsy without any outward sign of it...the person may have a sudden attack and will then do the most extraordinary things unconsciously and may commit any crime that would occur to them".⁵⁶ The key word here is "unconsciously", which brought epilepsy within the "nature and quality" limb of McNaughtan. Most judges stopped short of following Gill (1883) and Duncan (1891) and treating an "irresistible impulse" defence as a third limb of the Rules. Defences which rested openly on "irresistible impulse" tended to fail, at least where male defendants were concerned (e.g. Hudson 1895; Cromwell, 1896), although they might lead to a recommendation for mercy (Birtles, 1900; Allison, 1896).

The "nature and quality" and "right and wrong" tests could, however, be stretched to cover such cases. Phillimore J in Rodgers (1904) said that uncontrollable impulse was a dangerous theory but could be given credence in the case of a 15-year old boy killing his mother on the instructions of his voices. The question for the jury, however, was whether he was capable of knowing his act was morally wrong; and on this basis Rodgers was acquitted.

55. For medical views see Taylor & Stevenson (1891); Orange (1892a, 1896); MPA (1896). For a joint medical/legal view see Pitt-Lewis et al. (1895).

56. See for example Woolford (1898); Holbrook (1898); Rumley (1901).

In Prince (1898) Channell J told the jury to consider whether the killer of a celebrated actor knew his act was wrong in the eyes of "mankind in general and the law". All three medical witnesses testified that Prince was insane and regarded his action as "an act of justice brought about in some way by the intervention of the Almighty." The jury found him insane. In most cases judges followed the guidance of McNaughtan and left the word "wrong" undefined. It was unusual for Stephen's expanded definition of "wrong" to be explicitly adopted as it was by Channell J in an otherwise prosecution-minded summing-up in Kay (1904). Bucknill J followed the spirit of Stephen's definition in Simmons (1902), when he told the jury that for a special verdict they must find "that in consequence of [a] diseased mind [the] prisoner had not at that particular time a full appreciation of nature of the act which he committed. In other words that his mind was blank, or that he was under the uncontrollable impulse of a madman". Simmons' acquittal was hailed as particularly enlightened one in the Lancet (1902, 1: 1782), and can be taken as the limit of the elasticity of the McNaughtan Rules.

In some cases, however, judges seem either to have disregarded the rules or paid them the barest lip-service. Francis Murphy (1898) killed or attempted to kill his entire family because he thought he was dying of pneumonia and wanted them to die with him. Ridley J, demonstrating what Mercier called the "complete freedom" of "a large minded judge", told the jury that Murphy appeared to have acted more like a "wild beast" than a human being, and if so he was insane. In Norris (1898) a solicitor shot his wife (with whom he was "always on affectionate terms") and cut her throat; she survived. Grantham J "told the jury that there was only one verdict that they ought to find and that was that owing to overwork ... the defendant's mind became unhinged, and that he did what he did in a fit of temporary insanity and did not know what he was doing...and he hoped that with change the defendant would soon recover, and go back to business as good a man as ever." In Canham (1901) it is reliably reported⁵⁷ that Lawrence J did not refer at all to the McNaughtan rules but told the jury that "practically the only question, was whether, was whether the deed [of battering his wife to death and cutting his child's throat] was committed under circumstances which would absolve the prisoner from the full consequences of the crime".

57. By R. Percy Smith (1901: 539), co-author with Pitt-Lewis and Hawke of The Insane and the Law (1895).

Canham was found insane.

As medical witnesses grew accustomed to addressing the "ultimate issue" they became at least as adept as the judges at stretching the McNaughtan Rules. The prisoner had no "sound judgment and knowledge of what she was doing" (Holt, 1900); or "he would have had a very confused idea of right and wrong - be hardly capable of appreciating the nature and quality of the act he was committing" (O'Hara, 1900); or he "would not know he was doing a wrong act in the same way that a sane man would know" (Flower, 1899). Such equivocal answers sufficed to ensure acquittals. To state directly that the defendant, though of unsound mind, did know the nature, quality and wrongness of the act, was much more unusual (see Blackler, 1900 and Mer cier's comment thereon).

How far medical witnesses could sometimes go in denying that a defendant knew what he was doing can be seen in Coombes (1895). A thirteen-year-old boy stabbed his mother to death and continued living in the house with his younger brother, a "half-witted" adult friend and the corpse. Dr G.E. Walker of Holloway Prison described the crime as motiveless but this was contradicted by his own testimony: "he said he killed his mother because he was afraid that if he did not do so, she would kill his brother Nathaniel, and that she often threatened to knock his brains out with a hatchet, and had thrown knives at him"⁵⁸ - he [also] said he had an irresistible impulse - I took down those words." (OBSP at 1014.) Under cross-examination, Walker insisted that Coombes could have gone to a shop, selected the knife he would use, bargained for it, and bought it, all "while under the influence of homicidal mania", and that in this condition crimes could be "done with great deliberation" and yet without the perpetrator knowing the nature and quality of his act or the difference between right and wrong. Moreover homicidal mania might have no discernible symptoms prior to the crime. That the jury was willing to accept this theory is not altogether surprising. Although there was no real risk of a thirteen-year-old being hanged,⁵⁹ the jury may not have realized this; and it must have been easier to believe that the boy had never been quite sane since his temples were injured during delivery than that his

58. Several witnesses confirmed the mother's unstable character, though not these specific allegations.

59. The last time anyone under 18 was hanged in England was in 1887 (Chadwick 1992: 283 n. 104).

mother could have so terrorized him as to drive him to murder.

Judges and juries were not, however, prepared to accept uncritically what even the most eminent alienists told them, when there were other ways of making sense of the crime. Ridley J was the "large minded judge" praised by Mercier,⁶⁰ but there were limits even to his indulgence of medical witnesses, as Mercier found when in 1904 he and his eminent colleague Theophilus Hyslop testified that the Rev. Mr Bond, a retired asylum chaplain charged with indecently assaulting several young girls, was suffering from "senile brain decay". "I wish to speak with great respect for the doctors called", Ridley J told the jury, "but it is your duty to follow such evidence with a critical mind and judge it....I entirely repudiate the idea that mere decay of the faculties is evidence of insanity, or that a person suffering from senile decay is not responsible for his actions. I ask you to exercise your common sense as men of the world." They did, and Bond was convicted - much to the irritation of the Lancet (1904, 1: 676-7).

Even when judges took a favourable view of the medical evidence juries did not always accept it without demur. In both Weston (1895) and Peterson (1899) the judge asked the jury whether they needed any more evidence to find the defendant insane, and the jurors replied that they did; although in both cases they were eventually satisfied. The barrister Richard Harris (1886: 265, 268) advised his fellow practitioners that "no medical theory is a substitute for facts, and a single eccentricity of conduct is worth all the learning of the Royal College of Physicians....It may be stated generally that if the defence is too scientific it will fail. Fine phrases will acquit no prisoner."

William Bevan Lewis, Medical Director of the West Riding Asylum, was regarded by his medical colleagues as the foremost British authority on the brain and the author of a definitive textbook on mental disease (Clark 1982: 340), but he entirely failed to impress the jury in Cromwell (1896). Lewis testified that the 63-year-old unemployed moulder was "labouring under delusions of persecution with its attendant depression" when he battered his elderly neighbour to death with a hatchet. Cromwell, according to Lewis, was "a neurotic, with a disposition to nervous disease and mental instability" and suffered from "senile insanity dependent upon

60. In his report of Murphy (1898), *supra*; see also Mercier's comments on Watts (1900) and Samways (1904).

degeneration of the brain" (he was 63). The prison medical officer agreed. Defence counsel unwisely presented the case as one of irresistible impulse, but Henn Collins J suggested to the jury that they might think Cromwell "incapable of fully understanding that he was committing a crime." The jury needed only "a brief consultation" to find Cromwell guilty. The fatal weakness of Cromwell's defence was that his sense of "persecution" by his neighbour was not without foundation.⁶¹ What juries needed was a way to make sense of what had happened, and where the prisoner had a real grievance there was no need to fall back on an insane one.

The Hitchens and Cooper cases (cited earlier in connection with unfitness to plead) showed that juries could also defy the law when it seemed contrary to their common sense. Ernest Hitchens, the 21-year old son of a doctor, shot dead his elder sister and tried to commit suicide. He had written a note saying "I have been treated so badly by that beast of a sister Constance that I must put an end to her life by shooting, and knowing I shall have to die for it, I also shoot myself". Constance controlled the household budget and Ernest, having failed to earn his own living, had to apply to her for money and small luxuries; he seems to have felt humiliated by her power within the family. There was good evidence that Ernest was epileptic, but Day J cut short Dr Mercier's attempts to instruct the jury on "masked epilepsy" and the relationship between epilepsy and insanity. Day pointed out to the jury that the letter clearly showed Ernest's knowledge of what he was going to do and of its illegality, and that his fits "only lasted a few minutes, whereas the prisoner had written the letter, got the gun and cartridge and brought them to his room. Did the jury think that all this had been done in a sudden fit of insanity?" After 40 minutes' deliberation, the jury decided that it had.

In the case of Rev. Gilbert Cooper the jury delivered an even sharper rebuff to the judge. The Suffolk curate, as we have seen, was found fit to plead to the charge of cutting his vicar's throat. A new jury was then sworn and heard evidence that Cooper heard voices and saw "figures in the air", and that he had previously been confined to an asylum suffering from "homicidal mania". Quite apart from the medical evidence, his counsel argued, "The class of man who did it,

61. Bastian admitted this in his report to the DPP before the trial: PRO: HO 144/266/A57742. Vaughan Williams J advanced a similar explanation for the conviction of Christopher Barker: HO 144/250/A55030 (1893). The same may apply to the conviction, in the face of apparently cogent medical evidence, of Patrick Kelly (1888).

and the class of man to whom it was done, made this one of the maddest actions ever heard of." Field J summed up strictly in accordance with the M'Naughtan Rules: "any delusion which would avert criminal responsibility must be such a delusion which, if it were really a fact, would lead to [i.e. justify] commission of such an act." The summing-up was virtually a direction to convict, but the jury took just two minutes to find Cooper insane.

If such brazen defiance of the judges was rare, it is probably because judges usually avoided summings-up which invited it. And even where the jury rejected the medical evidence, there was the possibility that the prisoner would be reprieved by the Home Secretary.

Reprieves

Under the Criminal Lunatics Act 1884 s. 1 (4), the Home Secretary could appoint two or more medical practitioners to investigate the mental condition of a convict sentenced to death, and if they certified that he was insane could send him to Broadmoor. The Home Secretary would invariably take this course where the convict was insane at the time of examination, since it was contrary to common law to execute an insane person. If the report raised doubts about the convict's sanity at the time of the offence, the death sentence could be commuted to penal servitude for life, and transferred to Broadmoor if further observation in prison showed he was still insane.⁶²

These powers were not used frequently. In the nine years 1884-92, four men sentenced to death were certified insane and sent to Broadmoor, and a further three men and one woman were sent to Broadmoor after their sentences had been commuted to penal servitude for life (the woman, Elizabeth Lane, became insane only after several years in prison).⁶³ As the Under-Secretary of State at the Home Office explained in 1902, it was rarely necessary to reprieve a prisoner where insanity had been pleaded at the trial, since "juries as a general rule are not reluctant to give effect" to evidence of insanity.⁶⁴

62. See PRO: HO144/224/A49938 (1889) for an explanation and example of this practice.

63. Home Office (1893-4); on Lane see below, Ch. 7.

64. PRO: HO45/10268/X85432: reply by Kenelm Digby to an inquiry from the Colonial Office.

Those reprieved on the ground of insanity fell into four groups. First, there were those where the issue of insanity was either not raised at the trial,⁶⁵ or was pleaded on the basis of minimal evidence.⁶⁶ Second, there were cases where there was conflicting evidence at the trial and the prosecutions' witnesses prevailed. Although Sir William Harcourt, as Home Secretary, thought it "a serious thing to interfere in a case where the defence of insanity has been fully advanced at trial before the jury and rejected", the very fact that the witnesses had disagreed gave grounds for seeking a further opinion, which the Home Secretary would accept if it indicated insanity.⁶⁷ Thirdly there are cases where there was evidence of a degree of mental abnormality which would have required a very generous interpretation of the M'Naughtan Rules to define it as legal insanity. In Allen (1896) the medical evidence was to the effect that the defendant had brain disease, and a tendency to insanity, but was not actually insane. The defendant said hanging would save him the trouble of suicide and expressed the hope that he would not be reprieved; he was. Holmes (1904) beat his nephew to death with a poker. Dr Scott, the medical officer of Holloway, testified that he was "weak minded", and his physical disability might have made him sensitive and jealous towards his able-bodied relatives. The defence argued it was case of "irresistible impulse" arising from "homicidal mania", a plea which Mercier, in his note on the case, considered "entirely unsupported by the evidence" but which persuaded both the jury and the judge to recommend him strongly to mercy, which was granted.

Finally, there were cases like Gouldstone and Cole (see above), where the prosecution or the judge persuaded the jury to convict by a stricter than usual interpretation of the law, or by pointing to an apparently sane motive. The case of Bligh (1886) has already been mentioned as one where prosecuting counsel turned with uncharacteristic ferocity on the experts instructed by the Treasury, telling the jury that "mad doctors could always be got at any time to testify to the insanity of anybody". Bligh was a policeman who was dismissed after his sister-in-law named

65. e.g. PRO:HO144/146/A38218 (Joseph Shill, 1885)

66. PRO: HO144/160/A41412 (T. Sims, 1885); HO144/224/A49938 (Edward Wilkinson, 1889); HO144/236/A51738 (Edward Young, 1890).

67. See PRO: HO 144/529/A21703 (George Strattan, 1882, including Harcourt's remarks in a note to Godfrey Lushington); HO 144/250/A55030 (Christopher Barker, 1893); HO 144/266/A57742 (William Cromwell, 1896); Rennison (1897).

him as the father of her child. He killed his three children and cut his own throat, leaving a note to the sister in law: "I told you long ago that if you ever did it" (took out an affiliation summons) "I would not pay anything, so I have made away with all of us." The substance of the defence was that because he had a childhood history of epilepsy he was apt to be affected to the point of insanity by any grave anxiety. The experts who examined him on behalf the Home Office concluded that he had acted "in an access of acute mania" and he was sent to Broadmoor where he showed few if any signs of insanity and was discharged after ten years. In a revealing minute, Godfrey Lushington noted that "It would be impossible to allow this man to be hanged", even if the medical report had been different: "A man who kills his children and tries to kill himself under a sense of overwhelming family ruin is more fit for Broadmoor than the gallows."⁶⁸

The case of Collins (1893) shows the impotence of the stricter members of the judiciary in the face of this alliance of medical expertise and bureaucratic common sense. Thomas Collins, a ship's fireman, killed his "paramour" because, in what seems to have been an aural hallucination, he heard her accuse him of incest with his mother. But Charles J brought it home forcefully to the jury that Collins was not insane in the legal sense: Collins could hardly have made this clearer than he did by announcing immediately before the murder, "Mary, I will kill you, and I will die for it manfully." After sentence he was certified insane by Drs Nicolson and Brayne of Broadmoor, who had "no doubt that he was led to the murder of Mary Sheene, of whom he was very fond, by insane delusions with hallucinations of hearing". Charles J wrote to the Home Secretary: "I feel bound to say that I dissent altogether from the conclusions at which these gentlemen have arrived, but as their report has already been acted upon, it would be useless to give my reasons in detail..."

In cases like Collins the law appeared hopelessly incoherent. The sort of delusions Collins had did not affect his legal responsibility, yet they obliged the Home Secretary to treat him in exactly the same way as if he had been irresponsible. Strictly speaking, the jury and the Home Secretary were concerned with different questions: the former with the defendant's mental state at the time of the act, the latter with his state after sentence. Had Collins recovered from his

68. PRO: HO 144/287/B422 (30 July 1886)

delusions he would almost certainly have been spared the gallows but might have been sent to prison rather than to Broadmoor. But this did not assuage the judge's feeling that a legally correct verdict had been summarily overruled by the executive, nor did it convince medical critics of the insanity defence. As Mercier put it before his conversion to a less critical stance, the trial and sentence were no more than "a solemn but undignified farce....The judges say that they will not allow trial by jury to be superseded by trial by medical men; but the system that they uphold leads directly to, and involves, an appeal from trial by jury to trial by medical men" (BMA 1894: 352). In the 1920s, this contradiction would lead to a crisis in the administration of the insanity defence (Chapter 5). In the 1890s and 1900s however, the infrequency of reprieves in practice, and the flexibility of most judges and juries in applying the McNaughtan Rules, allowed Mercier and his moderate colleagues, as well as the Home Office, to accept that in practice the system worked to ensure that no real injustice was done.⁶⁹

Conclusion

In the controversial trials of the 1880s the judges veered between an acceptance that the law must change to accommodate the supposed advances of science and an unsuccessful attempt to restrain the scientific witnesses in a legal straitjacket. By the end of the century, however, a modus vivendi seemed to have emerged whereby most judges and alienists were content to bend or stretch the McNaughtan rules and the laws of evidence, rather than break them or press seriously for their reform.

The reasons for this rapprochement between law and medicine are complex, but can be summarized under two broad headings. The first was a trend towards the rationalization of criminal justice, combining the sometimes conflicting ends of legal due process and bureaucratic efficiency. Medical experts were co-opted into the newly centralized criminal justice system under the auspices of the Home Office, the Prison Commissioners and the Treasury Solicitor, while the judges successfully limited the encroachment of executive decision-making on their domain. The second trend involved a set of influences which is harder to demonstrate, since we

69. See MPA (1896) and Mercier's comments on Rennison (1897), Holmes (1904)

lack access to the deliberations of juries and (except for a few reflective individuals) the thought-processes of judges. Wiener (1990, Ch. 4) has argued that by the 1890s, under the influence of scientific naturalism and a growing sense of social stability, "images of human nature and social agency among the intellectual, professional and administrative classes had significantly altered from Victorian models" (1990: 174), becoming less confident in the power of the will, less afraid of the power of the uncontrolled impulses, and readier to view deviants as weak and degenerate rather than calculatingly wicked. How far can this generalization be extended to those men who met the middling property qualifications for jury service?

In an outstanding study of the cultural impact of science, Cooter (1984) focuses on phrenology, the controversial science which claimed that character could be read from the shape of the skull. Phrenological books and lectures reached a very wide audience in the early Victorian period, and although by the 1880s the theory was considered scientifically discredited, Cooter (1984: 258) argues that its naturalistic outlook had "insinuated itself unobtrusively in the public mind, becoming...one of those powerful but largely 'unseen influences of modern thought'." Among the ideas which phrenology, alongside evolutionary theory and orthodox psychological medicine, helped to instil in the public mind was the assumption that crime and madness could be understood in terms of organic derangement of the brain (*ibid*: 271). But what changed towards the end of the Victorian period seems to have been less the receptiveness of juries to such ideas, than the willingness of judges to allow juries to hear and evaluate them. The fear that medical views of behaviour would subvert the very basis of social order⁷⁰ seems to have gradually faded from judicial consciousness.

In her analysis of the development of the law on expert evidence, Carol Jones (1994: 13) pinpoints a fundamental dilemma which arose in the nineteenth century: "when science and technology go beyond the stage where they at least seem to be within the public ken ... then one is faced with either a total acceptance of scientific or technological developments, or a total rejection of them." It was largely in response to this dilemma, she argues, that restrictions on expert testimony such as the ultimate issue rule developed. The case of psychiatry illustrates the con-

70. See Southey (1865) for a particularly trenchant expression of this view.

verse of this position: where science remains relatively close to common-sense understandings of its subject matter, a middle way is possible whereby experts can be allowed to give their opinions freely and the jury can still be expected to evaluate those opinions critically.

This may seem a happy picture, in keeping with earlier historians' view of science gently leading public opinion towards a more benevolent view of the insane (Tuke 1882, Ives 1970 [1914]). I would suggest a different assessment. Late-Victorian psychiatry may have saved a few strange people from the gallows but its wider effects were far less benign. As Stephen was well aware, a modest relaxation of the insanity defence was a way of preserving the legitimacy of the death penalty. And as Castel (1988) argues, the more psychiatry blurred the distinction between the criminal and the lunatic, the more it emphasized their supposed common feature: dangerousness. The alienists' ideal was a world in which there would be no criminal lunatics because the insane would all be detained before they committed a crime (Orange 1883). If only his colleagues would be more energetic in collecting details of murder trials, Mercier urged (in his report on Wyatt, 1900), "the country would be appalled, and the Lunacy Acts at once amended in a very drastic manner". As it was, murder trials in which insanity was pleaded certainly gained enough publicity to reinforce the increasing tendency of the press to equate violent crime with mental derangement (Mellett 1982: 90). They also powerfully reinforced the terrible stigma which blighted the lives of generations of people with epilepsy (Hill 1981). Epilepsy was linked not only to insanity and violence but to "egotism, obstinacy, deceitfulness, hypocrisy" (BMJ 1906, 2: 264) and the "moral decadence due to the blunting of finer sensibilities" (Lewis 1893: 339). Such scientific "knowledge" might accord with the common sense of the average juror but it contributed precious little to any real understanding of the human mind or brain, or to the creation of more just or humane society.

CHAPTER 4

THE NEW SCIENCES OF CRIME

Between the 1880s and the 1930s, the unstable class and gender relationships of English society provided fertile ground for the growing number of expert definers and solvers of social problems: "Even before the Great War came to test its cohesion, class society began to go into crisis, which ...could only be surmounted by measures which challenged the system and called in the professional experts to help provide them" (Perkin 1989: 170). The Victorian view of the state as a "nightwatchman" guarding a *laissez-faire* political economy gave way to a more interventionist view - articulated in different political tones by Fabian socialists, "new liberals" and "social imperialist" Conservatives alike - of the place of "scientific" administration in fostering social well-being.¹ As Garland (1985) has argued, this era, and particularly the period 1895-14, also witnessed a profound transformation in the discourses and practices which make up the "penal complex" or "penality". Innovations such as probation (placed on a statutory footing in 1907), the juvenile court and the borstal institution (both created in 1908), marked a shift towards a more welfarist penal system and a growing individualization of punishment. This new penal strategy, argues Garland, was closely linked to the emergence of new kinds of knowledge centred on the individual offender.

In this chapter I shall discuss three aspects of this new knowledge and their implications for the definition of criminal responsibility. First, there is the issue of whether the very idea of a "scientific" explanation of crime was in conflict with "the doctrines of free will and responsibility", which formed the basis of the whole legal edifice" (Garland 1985: 85, his emphasis). I shall argue that the conflict between criminology and legal discourse was not quite so clear-cut as this way of describing it suggests, but was none the less real. Secondly, this chapter will examine the emergence of the "feeble-minded" criminal as a discrete category of partially responsible offender. The third aspect of "criminal science" to be discussed is the development of a new know-

1. See Garland (1985: 53-8) for a summary of the key socio-economic trends; Perkin (1989, esp. Ch 4) on the rise of the professions and the "crisis of class society"; Hall and Schwartz (1985) for a Marxist analysis; and Harris (1994, Chs 7-8) for an overview of social theory and policy up to 1914.

ledge of the offender's conscious and unconscious mind, influenced to varying degrees by psychoanalysis. Psychoanalysis first emerged as a significant force on the medico-legal scene in the context of military justice during the first world war. It was (and is)² potentially more subversive of legal orthodoxy than positivist criminology, because it challenged not merely the metaphysical notion of free will but the very existence of a rational, unified, self-conscious subject. Its subversive potential was not, however, realized in England between the wars. Instead, what psychoanalysis and its derivatives did was to encourage forms of intervention targeted on the milder forms of mental pathology (Armstrong 1983). In relation to crime, the effect was to break down the correspondence (which the discourse on feeble-mindedness had taken for granted) between degrees of abnormality, degrees of responsibility, and suitability for medical as opposed to purely penal control.

Criminology and Determinism

Garland (1985: 185) writes that criminology "was caught in a contradictory position, being both for and against determinism. On the one hand, the notion of determinism supplied criminology's theoretical raison d'être, but, on the other, a total determinism or fatalism would altogether deny its penological intent" (his emphasis). Moreover, according to Garland, criminological determinism provoked resistance from those who saw it as a threat to the basis of criminal law. Whilst there is some truth in this observation, it is important to be clear about the precise nature of criminology's threat to law and to orthodox penology. It was not determinism per se that posed a problem, but a combination of the weight given to heredity and the breadth of the category of criminals who were considered constitutionally abnormal.

The metaphysical issue of determinism versus free will was (as we shall see in Ch. 6) of little to concern to lawyers, and could equally be dismissed by penologists (Donkin 1915). Medical writers and lawyers could agree, as the alienist J. Batty Tuke and the Scottish advocate Charles Howden did, to

put aside ... free will in its technical sense as an idea which belongs to metaphy-

2. See for example Barron (1993).

sics and not to law. What we have to deal with is that capacity of being able to choose between our possibilities of action; of the capacity to obey the law from whatever sanction, which is sufficiently familiar to us in ordinary life, however difficult it may be to put in theoretical form without becoming involved in meta-physical questions.

(Tuke and Howden 1904: 184-5.)

If they needed to put the matter in theoretical form they could turn, as several leading medical writers did (see Haley 1978: 44-5; Wiener 1990, 42-3), to the works of John Stuart Mill, who had argued that determinism - the view that human actions are caused as are other events in the world - was entirely compatible with the law's assumption that actions result from motives, among which is the fear of punishment (Mill 1979 [1865]). Charles Goring, whose book The English Convict (1915) was by far the most influential English criminological text of its time, and whose early academic career had combined philosophy and medicine,³ had little difficulty in distinguishing between fatalism and determinism, or in reconciling determinism with reform: "the aim of reform is not to eradicate tendency; it is to strengthen the will to overcome tendency...to modify conduct by strengthening the will to act decently even in the face of adverse circumstances" (1918: 132). Goring's position echoed Mill's argument that "our will, by modifying some of our circumstances, can modify our future habits and capabilities of willing" (1924 [1873]: 144). But whilst at a philosophical level this might be an adequate refutation of the charge of fatalism (and particularly the criticisms made by Donkin, 1917), it failed to carry conviction in the context of Goring's emphasis on the overwhelming importance of heredity in determining character (Donkin 1919; Beirne 1993 Ch. 6). If a convict was born with a marked "criminal diathesis", it was difficult to see how "the will to act decently" could be implanted in him even by the most enlightened penal regime.

For orthodox medico-legal writers like Tuke and Howden, the task of medicine was to identify the limited category of people who lacked the capacities required to be a responsible legal subject. The new criminological theories undermined this project, suggesting that the line which medico-legal discourse sought to draw between responsible and irresponsible subjects was

3. In 1893 he was awarded, aptly enough, the John Stuart Mill Studentship in Philosophy of Mind and Logic at University College, London (Beirne 1993: 213-4).

scientifically meaningless. Depending on how one defined the word, either no-one or everyone could be considered "responsible". Havelock Ellis (1901) criticized the proposed extension of the insanity defence by quoting - unlikely an ally as he might seem - a dictum of Baron Bramwell's:

If we define insanity as a loss of self-control and accept that as a "defence," we are encouraging every form of vice and crime because we are removing the strongest influence in the formation of self-control. When a defence of kleptomania was brought before an English judge in a case of theft he is said to have observed, "Yes, that is what I am sent here to cure." We need not hesitate to accept this conception of the function of the court, provided always that the treatment is scientific, effective and humane.

(Ellis 1901: 357)

Bramwell would not have cared for the proviso; but Ellis's point was that whether they were insane or not, offenders were "responsible" in the sense that they had to suffer the consequences of their anti-social actions, and whether they were insane or not that reaction should take the form of segregation and, where possible, cure. (Unlike most European positivists, Ellis did not favour the death penalty.) Of Stephen's proposed extension of the insanity defence, he asked: "How many persons guilty of serious crimes - the only class in regard to whom the question is of practical importance - are to be accounted sane?" (*ibid*: 356). Given Ellis's view of "the criminal" as "a congenitally weak-minded person whose abnormality ... chiefly affects the feelings and volitions" (*ibid*: xv), most serious offenders could be regarded as suffering from a pathological lack of self-control which would qualify them for Stephen's proposed intermediate verdict.

As for minor offenders, according to the Scottish lunacy commissioner J.F. Sutherland:

Surely ... it is not safe to dogmatise as to the responsibility of the largest section of petty offenders and a small section of criminals, the "inverts" and "perverts," the "can't workers," and the "born treds," There is much to be said for the relativity of the responsibility of the derelicts of society with all the drawbacks and disadvantages of environment, bad heredity, and a degeneracy bequeathed or acquired.

(Sutherland 1908: 82)

What this meant was not that the courts should attempt some more subtle weighing of moral responsibility, but that they should fit the punishment to the criminal rather than the crime. The only offenders to whom Sutherland's obscure doctrine of "relative responsibility"

unequivocally did not apply were "professional" criminals (Sutherland 1907: 79). Another medical writer (Wilson 1908: 187) declared that "The average criminal is like an overgrown baby ... many of these criminals as mental cripples cannot be held responsible, or credited with either clear judgment or free-will."

Views such as these were countered by more established figures⁴ such as Nicolson, Donkin, Mercier (1918) and later W. Norwood East, who stressed the normality of most criminals:

[I]t is not for us to stamp "criminals" as lunatics or quasi-lunatics, or to place them on a special morbid platform of mental existence, merely because they prefer thieving, with all its concomitant risk, to more reputable, if more laborious, modes of earning a living.

(Nicolson 1910: 1022)

[I]t must be admitted that the criminal may be no mental weakling, but a man of courage, determination and superior intellect. He is in fact the man in the street, we are all potential criminals....And no useful purpose is served by regarding the offender as abnormal merely because he commits crime.

(East 1928: 25)

For this school of thought, the task of medical study of crime was to delineate limited groups of abnormal offenders requiring special treatment. These groups, however, extended further than the conventional category of the insane. The most important group comprised those who were "weak-minded" or mentally defective.

Weak-Mindedness and Mental Deficiency

In "The Morbid Psychology of Prisoners" David Nicolson, then a prison medical officer, discussed the role of prison discipline as "a test of mind" (Nicolson 1874: 167-185). He drew up the following "psychological classification" of prisoners:

I. FIT FOR PRISON DISCIPLINE:

4. See Garland (1988, 1994).

1. Accidental or Casual Criminal. - Mental condition within ordinary range.
2. Habitual or Thorough Criminal - Mostly unintelligent, wilful and impulsive. Moral depravity and grossness, with low selfish cunning. (Criminal-minded.)

II. UNFIT FOR PRISON DISCIPLINE:

3. Weak-minded Criminal. - Evidences of a mind morbidly defective or disturbed, requiring the relaxation of prison discipline, but not warranting or rendering expedient a certificate of Lunacy. Partially responsible.
4. Insane Criminal. - Irresponsible and fit for certificate.
(Nicolson 1874: 168, layout modified.)

In this categorisation an administrative judgment - what form of discipline is best suited to this inmate? - is translated into a medical and a moral one: is the prisoner mentally normal and is he or she responsible? As a criterion of responsibility this is not as arbitrary as it may appear: Nicolson bases it on the legally orthodox test of deterrability. "No prisoner whose mind is fairly regulated will lay himself open to such punishment as will be likely to affect him seriously" (*ibid*: 172). A prisoner who repeatedly incurs punishment by resisting the discipline of the institution therefore gives prima facie evidence of an ill-regulated mind. But the prisoner may be simply a

good-for-nothing scoundrel...whose insubordinate and violent tendencies, when once he has begun a desperate course, are equalled only by his utter callousness in the matter of punishment. To hold that all such are irresponsible and not punishable would be a dangerous doctrine, and would simply provoke more numerous assaults on the part of criminals, with the view of obtaining the specially mild treatment accorded to the weak-minded class

(*ibid*: 172-3).

The problem of distinguishing the weak-minded from the insubordinate prisoner was therefore the same one that was posed by the insanity defence: how to distinguish those whose impulsive wickedness required the strongest possible deterrent to keep them in check, from those who were prompted by delusions or by "the mental instability that is so easily kindled into uncontrollable impulse" (Sturrock 1910: 667). Ever wary of malingerers, medical officers were inclined to err on the side of caution (Radzinowicz & Hood 1986: 538; Watson 1994). From

1888 onwards Matthew Sampson, a prisoner in Dartmoor, was "constantly making rambling statements and talking nonsense at interview, complaining of being poisoned & C.", but the medical officer found no "ground for considering him to be otherwise than of sound mind." Four years later the medical officer still thought he was "feigning insanity with a view to be transferred to the weakminded party". Not until 1885 was he treated as weak-minded, and only in 1897 did the medical officer finally decide he was insane.⁵

The fact that Sampson had been repeatedly punished as a sane man led the Home Office to propose that the medical officer should be required to certify not only that a prisoner was fit for punishment but that "to the best of my knowledge and belief there is nothing in his [her] mental condition to justify a doubt as to his [her] responsibility for the conduct for which the punishment is awarded."⁶ The Prison Commission objected, however, on the ground that "The medical officer, not being present at the time of the action, cannot certify as to the actual responsibility of the agent" - a scruple that rarely seems to have troubled doctors testifying in court.⁷ The Home Secretary backed down and agreed that the "remarks" column in the certificate of fitness should simply be amended to add "especially as to the prisoner's mental state."⁸

As Sampson's case illustrates, the term "weak minded" covered both intellectual deficiencies and borderline insanity. In a memorandum to the Royal Commission on the Care and Control of the Feeble-Minded, O.F.N. Treadwell, the medical officer of Parkhurst where weak-minded prisoners were concentrated after 1896 (Walker and McCabe 1973: 42), divided a sample of 100 such inmates into 60 "cases of probable congenital deficiency or of defective development during early life" and 40 who were either in the early stages of insanity *or had not* fully recovered from an attack of it (Royal Commission 1908a: 247).⁹ Treadwell listed the following as indications of low intelligence and lack of judgment:

5. PRO HO 144/179/A43422/10 (Governor's and medical officer's reports, 1889, 1893, 1897, quoted in the Home Office's summary of the case).

6. *Ibid.*, memo by H.B. Simpson (approved by the Home Secretary), 19 May 1897 (square brackets in original).

7. *Ibid.*, Evelyn Ruggles-Brise, 29 July 1897.

8. *Ibid.*, Minute by Sir Matthew White Ridley, 29 Oct. 1897.

9. See also the figures provided by Dr Smalley, the Medical Inspector of Prisons, at p. 175.

The committal of semi-impulsive acts; assaults, destruction of furniture, clothing, etc.; breaking of windows; self-mutilation and the use of threatening, abusive and obscene language for trivial and quite inadequate causes; extreme obstinacy, idleness and laziness; sullen or defiant moods alternating with periods of cheerfulness and submission; untidy, dirty or filthy habits; tendencies to threaten suicide or make feigned attempts at such.

(*Ibid.*, Q. 4301)

From another perspective, these can be seen as acts of resistance or despair by those subjected to a repressive regime (Sim 1990).

As we saw in Chapter 2, the fact that lunatics in asylums could be controlled by the threat of punishment was seen as a strong reason why some insane people should be held legally responsible. Conversely, the fact that some prisoners could not be controlled by punishment seemed to provide a reason why some technically sane people should not be held responsible. The Prison Commission Chairman Sir Edmund Du Cane, not usually noted for his support of "progressive" causes, thought it "*obviously quite contrary to the spirit which characterizes our social legislation in modern times that persons who do not come within the technical definition of insanity but whose minds are so defective that they cannot take care of themselves should be sent to prison*" (Commissioners of Prisons 1884-5: 14). He thought they should be put "under control permanently", if public opinion would stand for it (Departmental Committee 1895 Q. 10773). The Gladstone Committee accepted that the weak-minded (which it estimated comprised 2% of the prison population) were not fully responsible and might be more appropriately dealt with by indeterminate detention in asylum-like institutions (*ibid.*: 93).

Such arguments found growing support around the turn of the century from those who regarded "the feeble-minded" as "a social danger".¹⁰ The "feeble minded" became a focus of official and philanthropic concern largely because of their failure to meet the standards set in the compulsory elementary schools introduced in the 1870s (Rose 1985: 100-4). The sense that they were a "social danger" arose from a wider set of concerns about the supposedly degenerate urban "residuum" and the threat it posed to the nation's economic and military competitiveness (Searle

10. "The Feeble-Minded: A Social Danger" was a paper by the mental deficiency expert A.F. Tredgold which Winston Churchill, as Home Secretary, circulated to his cabinet colleagues in 1911 (Wiener 1990: 354-5).

1971; Mackenzie 1981b: 39-41). A "scientific" response to these problems was offered by the eugenics movement who proposed segregation and/or sterilization to prevent "the unfit" propagating their kind (Searle 1976; Mazumdar 1980). Searle (1981: 239) has argued that eugenics failed "to articulate the class interests of any major group in British society" and consequently its influence on social policy was ultimately slight; but its propaganda, and particularly the moral panic it aroused about the fertility of feeble-minded unmarried mothers, contributed to the setting-up of the important Royal Commission on the Feeble-Minded which reported in 1908 (Simmons 1978; Sim 1990: 138-43).

The Royal Commission received a wealth of evidence on weak-minded prisoners from prison medical officers and alienists. Herbert Smalley, the Medical Inspector of Prisons, claimed that such prisoners were almost invariably recidivists,¹¹ and also tended towards "procreation ... thus adding to the criminal and immoral classes" (1908a: 176-7). G.B. Griffiths, Deputy Medical Officer and Deputy Governor of Holloway, urged that recidivists who showed symptoms of "deficient self control" should be detained at Her Majesty's pleasure. He "most strongly advocate[d] a long term of seclusion for feeble-minded criminal women during the child-rearing period" (p. 649). James Scott, medical officer of Brixton, *paid particular attention to the question of responsibility of the weak-minded*. They could not usually be brought within the McNaughtan rules because they knew what they were doing and that it was legally wrong (p. 276), even if they had "very little idea of it being morally wrong" (p. 278, Q. 4926). But they "could not fairly be held fully responsible for their misdeeds....Their moral sense is very defective, and they have little self-control or power to resist temptation". Because the courts treated such partial responsibility as a mitigating circumstance they tended to receive short sentences¹² or be discharged by the magistrates (p. 276 and Q. 4914). Segregation was needed "from the point of view of impro-

11. Since the 1860s, weak-mindedness had provided a convenient explanation for the prisons' failure to deter or reform their inmates (see Saunders 1985; Zedner 1991: 264-5).

12. Examples of relatively short sentences being awarded on the grounds of weak-mindedness are Cross (1898) - one year's imprisonment for attacking two women with a dagger and revolver, following the jury's recommendation for mercy; and McQueen (1912) - 12 month's hard labour on housebreaker of "decidedly weak mind" reduced on appeal to six, Channell J expressing the hope the new Mental Deficiency Bill would allow such cases to be dealt with. But weak-mindedness could also justify a longer than normal sentence as in Buggs (1910) - 18 months for stealing a pair of boots upheld on appeal.

vement of the race" (p. 276). On similar grounds, Sir James Crichton-Browne, one of the Lord Chancellor's Visitors in Lunacy, advocated a special verdict of "Guilty but of weak mind - a verdict that would involve detention during her Majesty's pleasure but not necessarily in a criminal asylum" (Q 5997).

Two witnesses who expressed reservations about such changes to the criminal law were C.E. Troup of the Home Office and Sir Edward (formerly Lord Justice) Fry. Troup pointed out that medical evidence of weak-mindedness would often rely on an offender's criminal record, which would be inadmissible evidence in a criminal trial (Q. 1323). Fry's view was that "Imprisonment for punishment is one thing; segregation for imbecility is another, and I do not think the two things should be mixed" (Q. 5789). In this he was expressing the common view of the judges. A letter by the Lord Chief Justice to the Home Secretary (quoted in Royal Commission 1908b para. 458) stated that the judges' unanimous view was that the question of feeble-mindedness should not be left to the jury but determined either by the judge or the Home Secretary.

By highlighting the issue of the weak-minded prisoner and linking it to wider social concerns, the prison doctors enhanced their claims to a special body of expertise distinct from that of the alienists (see Watson 1994). Sir Bryan Donkin, a member of the Royal Commission as well as the Prison Commission, claimed that the initiative for setting up the Royal Commission had come largely from the prison service and that the "lunacy experts" who testified "were either blind to mental defect as distinguished from mental disorder, or ignorant of its social importance and the considerable part it takes as a factor in the production of crime", proving "that the prison service has nothing to learn about mental disorder and deficiency in criminals from lunacy specialists" (Donkin 1915: 1348).

It was, however, the lunacy specialists rather than the prison doctors who highlighted the problem of the "moral imbecile" before the Royal Commission, although this diagnosis was later to become something of speciality of the prison medical service (Watson 1994). The typical moral imbecile described by Drs Savage (the Royal College of Physicians' representative), Mercier and Ferrier was a rich, young "waster", thief or homosexual (Qq. 6509-52, 6678-94, 6879-72, 6907, 6930). One member of the Commission asked Dr Savage:

So...the difference between your moral imbecile and the professional housebrea-

ker or the habitual criminal is that one is gently born and one is low-born, is that it? [Savage:] - The habitual criminal sometimes is of bad origin and is degraded, but the morally insane person I have referred to is out of all relation to his or her education and environment, whereas I should have thought the habitual criminal was not....

(Q. 6652.)

It was, of course, in the nature of the lunacy specialists' practice that the families who consulted them about their wayward young members tended to be "respectable" ones (Hollander 1922: 170).

In theory, the criminal responsibility of the moral imbecile raised a very difficult issue, which Mercier, as the leading medical theorist of both moral imbecility and responsibility, discussed at length. He defined moral imbecility as "an original defect displayed from an early age, and consist[ing] in an inability to be deterred by punishment, however severe, certain and prompt, from wrongful acts" (Mercier 1905: 201). The moral imbecile was wanting not simply in morality but in prudence or "wisdom"; as W.C. Sullivan (1924: 199) succinctly put it, "the moral imbecile, in addition to being a knave, is a fool." In keeping with his idiosyncratic general theory of insanity (see Mercier 1910a), Mercier regarded moral imbecility as a disorder of conduct, rather than mind. Unlike later theorists of "psychopathy", Mercier did not infer a mental disease from conduct and then use it to explain that conduct, he asserted that extremely imprudent conduct in itself constituted a disease. As Watson (1988) argues, this view of moral imbecility fitted in awkwardly with orthodox medical and psychological thinking, but was perfectly consistent with the diagnostic practices of the prison medical service. It also, as Mercier was well aware, sat awkwardly with the legal view of insanity which looked for a "disease of the mind" separate from the conduct it was meant to cause; although if moral imbeciles were undeterrable, utilitarian considerations suggested they should not be held responsible. Mercier (1905a) accommodated the moral imbecile within his compromise solution of treating much mental disorder as a mitigating circumstance rather than a full defence. In practice, psychiatrists (perhaps wary of a repetition of the Victorian controversy over moral insanity) rarely if ever advanced moral imbecility as a defence to serious crime; when the diagnosis was used it was as a

justification for detaining relatively minor offenders as defectives.¹³

The Royal Commission's own medical investigators visited some of the local prisons to assess the prevalence of mental deficiency among the inmates, and concluded that it was much higher than the 3% suggested by the prison service: 10.28% of prisoners in the institutions they visited were assessed as being mentally deficient. As W.A. Potts, one of the investigators (and later an important figure in the development of forensic psychiatry) pointed out, a prisoner who worked well would not be considered "weak-minded", but the ability to perform the simple tasks of a prisoner was not an adequate test of ability to manage one's own affairs in the outside world (Royal Commission 1908b, paras. 408-9).

The Commission therefore concluded that large numbers of offenders who were "not normally responsible" were detained in prison for want of anything better to do with them (para. 371). Exactly what the Commission meant by "normally responsible" is obscure. The Report states that it uses the term "criminal responsibility" in the strict sense of "liability to punishment" (para. 450), but it also refers repeatedly to something called a "sense of responsibility", without ever explaining what this is or what it has to do with responsibility in the legal sense. It concludes, however, that the M'Naughtan rules "cannot but be set aside as insufficient" to cover mental deficiency, which may include a "defect in any of the faculties or qualities of the mind", whereas the rules are a purely "intellectual" test (paras. 465-6). Moreover the question of responsibility was too complicated to be left to a jury (para. 459). The Commission's solution was to leave it to the judge to choose (on the basis of medical reports) between a medical or a penal response. On the medical side, a court should have power to commit an offender to an institution, or to release him or her to the care of a local authority committee for the mentally defective. A summary court should also have the power to adjourn a case *sine die* and make a reception order without proceeding to conviction. On the penal side, the Commission rejected the idea of an indeterminate sentence and recommended that a court should pass an ordinary prison sentence, following which the offender could be dealt with under a civil reception order, renewable annual-

13. See the discussion of True (1922) in Ch. 5 below. For cases illustrating the use of moral deficiency see Hawkins (1890); East (1927: 147-54).

ly.¹⁴ The Commission defended this proposal by reference to the mysterious "sense of responsibility":

Of course, if it could be argued that no such mentally defective person could be in any degree responsible, the course here suggested could not be defended; but all the evidence goes to show that in these cases there is no fixed line in regard to the sense of responsibility any more than there is a fixed line in the nature and extent of mental defect. Where the defect of the brain is greater, the responsibility is less, until a point is reached where it is practically non-existent, as in the case of idiots and low-grade imbeciles....Recognising these variations, therefore, we suggest that the element of punishment should be retained, so far as it is valid, but that ... care and control should follow.

(para. 463)

The Royal Commission's report is of great significance in the development of criminal mental health law, since it introduced the central feature of the modern English system, the judicial power to commit a convicted offender to hospital. *Regarding the issue of responsibility as a complicated scientific question beyond the competence of the jury, the Commission sought to separate the formal determination of legal guilt, which could safely be left to the jury, from the determination of responsibility for the purposes of punishment or treatment, which must be decided by the judge on the advice of experts.*

After a considerable political battle between the sympathizers and opponents of eugenics (Searle 1976; Unsworth 1986) a modified version of the Royal Commission's proposals emerged as the Mental Deficiency Act 1913. The Act gave the criminal courts power to deal with four types of mental defectives: idiots, who were "unable to guard themselves against common physical dangers"; imbeciles, who were "incapable of managing their own affairs; or, in the case of children, of being taught to do so"; feeble-minded persons, requiring "care, supervision or control for their own protection or the protection of others"; and "moral imbeciles - that is to say, persons who from an early age display some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has little or no deterrent effect." In each case these disabilities had to be due to a defect of mind present from birth or from an early age. Under

14. Although the Commission envisaged that such prisoners would serve out their sentences before being committed to mental deficiency institutions, it also recommended that any prisoner found to be defective should, subject to the Secretary of State's consent, be transferred to such an institution forthwith.

s. 8, where a defective was convicted of an imprisonable offence (this excluded murder, for which the only sentence was death), the court could either postpone passing sentence so that civil proceedings under the Act could be instituted (by the local authority whose representative would usually be present in court: see Davey 1981 [1914]: 56); or the court could itself commit the defective to an institution or to guardianship. A magistrate's court had the option of taking any of these steps without proceeding to a conviction, if it found the case proved (a clause in the Bill which would have given the court power over an acquitted defendant was dropped: Radzinowicz and Hood 1986: 337). S. 9 provided for the transfer of imprisoned defectives to certified institutions.

Theoretically, the Act seemed to introduce "a new attitude" to legal responsibility, recognising a class of offenders who could not be held fully responsible as they lacked "control over their passions and actions" (Armstrong-Jones 1923: 333). The power to impose an order without conviction, though it merely gave statutory recognition to a long-standing practice in magistrates' courts (see Chapter 3), also seemed a significant innovation (Stroud 1914: 97). With hindsight, the power to make a medical rather than a penal order on a convicted offender seems even more noteworthy, as it prefigures the hospital order introduced by the Mental Health Act 1959 (Walker and McCabe 1973). The Act can therefore be seen as one of the series of measures enacted between 1895 and 1914 which laid the foundations of a modern, welfarist approach to penality (Garland 1985: 223-5). But like some other measures of this period (the Inebriates Act 1898, for instance), the effects of s. 8 in practice were less dramatic than its theoretical innovativeness might suggest.

Statistics on the use of the new powers can be found in Walker and McCabe (1973: 74). Starting in double figures, the annual total of orders under s.8 rose to 133 in 1919, then climbed slowly but steadily to reach 332 in 1938.¹⁵ The great majority of orders (89.9%) were made in magistrates' courts, and most of these were made without recording a conviction. By comparison with the statistics for legal insanity these were respectable enough (the 46 findings under s. 8 at Assizes in 1938 compare with a total of 50 found guilty but insane or unfit to plead), but they

15. This increase was offset by a decline in the number of prisoners transferred under s.9, from 409 in the five years 1924-8, to 187 in 1934-8 (East 1944: 77).

hardly suggest that the new provision was dealing with a major social problem. As W. Norwood East (then Senior Medical Officer at Brixton) argued in 1923, "hyperenthusiasts" had led themselves and others "to expect impossible benefits from the Act". He drew attention to "a large group of mental inefficient, consisting of subnormals, cases of undeveloped psychoses, psycho-neuroses and neuroses" - the "weakminded" under another name - who remained outside the scope of the Acts (East 1923: 228).

As Walker and McCabe (1973: 62) point out, the use of the criminal provisions of the 1913 act does not seem to have been affected significantly by the amendments introduced by the Mental Deficiency Act 1927. This substituted a requirement that mental deficiency should have been present before the age of 18 for the "early age" requirement under the 1913 Act, re-labelled "moral imbeciles" as "moral defectives" and dropped the requirement that punishment should have no deterrent effect on them. One reason for these changes was to allow young people who became delinquent as a result of encephalitis lethargica¹⁶ to be classified as "moral defectives".

BMA Committee recommended, however, that this should not be done "unless it is certain that no other classification will enable them to be properly dealt with" (BMA 1932, para. 9). The label was too stigmatizing for a group which commanded considerable sympathy: an MP thought it "One of the biggest tragedies in this country" that no suitable institution for encephalitic offenders existed (quoted in BMJ 1928: 925). Prison medical officers, however, complained "that cases which [sic] have apparently recovered from Encephalitis Lethargica urge that disease as conferring a perpetual immunity from punishment, just as epileptics, drunkards and persons who have been certified previously as insane are apt to do" (Prison Commission Report for 1928: 33).

In his reports as Medical Commissioner of Prisons, Dr G.B. Griffiths called for the removal of "weakminded habitual petty offenders" who were not covered by the existing Mental Deficiency Acts to some form of labour colony (Reports for 1922: 43; 1924: 33).¹⁷ But the

16. A worldwide pandemic of this virus (colloquially known as "sleeping sickness") occurred between 1916 and 1927. Children and adolescents who survived the disease "sometimes showed abrupt changes in character, and became impulsive, provocative, audacious salacious and lewd, sometimes to a quite uncontrollable degree" (Sacks 1982: 18).

17. In a return to late Victorian practice, "weakminded" prisoners were concentrated in selected prisons where a modified regime was provided from them (Commissioners of Prisons 1924-5: 34; 1925-6: 33).

Departmental Committee on Persistent Offenders (1932) rejected suggestions that the definition of defectiveness should be further extended to cover "incurable criminals" (para. 103) and perceptively analysed the dynamic behind such proposals:

Experience indicates that as the conception of mental defectiveness becomes less exclusive a group remains in the borderline of the accepted standard of normality and invites inclusion within the defective class. If the definition of mental defectiveness is widened, a certain number of the subnormal group will be included as defectives, but the standard of subnormality will tend to rise also.

(para. 105)

East (1938: 208) calculated that 0.43% of all persons received into prison in the five years 1929-33 were found to be certifiably mentally defective, while 0.71% were certifiably insane - and these figures include prisoners remanded for the purpose of ascertaining whether they were defective or not.¹⁸ Lewis (1944: 93) quoted those figures and concluded "that the administration of those sections of the Act specially applicable to criminals, has been disappointing except in a few large cities such as London and Birmingham where the magistrates, police and prison officials on the one hand, and the local authorities on the other, have co-operated well" (p. 93). As Saunders (1988) has shown, psychiatric institutions had long been reluctant to relieve the prisons of their "weakminded" and troublesome inmates, and this attitude seems to have persisted into the 1920s (Walker and McCabe 1973: 24). Smith (1922b: 135) complained that "the working of the Act is still hindered, in some places, by indifference and even by open hostility". Where good working relationships were achieved, as in London, they depended on the use of I.Q. tests which provided an "objective" standard of assessment on which prison doctors and county medical officers could agree (Fairfield 1930: 2-3). As Watson (1988, 1994) argues, the use of these tests (a product of the education system) tended to undermine the prison doctor's expertise which was based on the observation of behaviour. "Moral defectiveness", which did not lend itself to such objective measurement, was unpopular with the medical profession outside

18. Of the 1,296 prisoners certified defective, 960 (74%) were certified at trial (East 1936: 388).

prisons.

From the point of view of those caught up in them, the impact of these provisions was far from trivial.¹⁹ Because periods of detention were long, the cumulative effect of ss. 8-9 of the 1913 act was considerable. By 1st January 1938 there were 3,491 male and 894 female criminal defective detained or under guardianship, including 468 males and 137 females considered dangerous enough to be admitted to the State Institutions at Rampton and Moss Side (Board of Control 1937-8: 40). In terms of its impact on the legal definition of responsibility, however, the 1913 act in the short term was something of a damp squib. In the long term it was more in the nature of a slow-burning fuse.

Shellshock and the "New Psychology"

The year of the Mental Deficiency Act, 1913, was equally significant in the history of English psychoanalysis: it saw the foundation of the London Society of Psycho-analysts and the opening of the first psychotherapeutic clinic in Britain (Hearnshaw 1964: 164-5), as well as the first English edition (for sale to lawyers, medics, clerics and scholars only) of The Interpretation of Dreams (Read 1994: 490). The next year, by "a wonderful turn of fate", the outbreak of war "produced on an enormous scale just those conditions of paralysis and contracture, phobia and obsession, which [Freud's] theory was especially designed to explain" (Rivers 1917: 913).

As Stone (1985), Rose (1985) and Showalter (1987) have argued, the numerous psychiatric casualties sustained by the army - and particularly among officers who seemed unlikely cases of hereditary degeneracy - posed a problem which conventional psychiatry could neither explain nor cure. The symptoms of what was known (controversially) as shellshock could include amnesia, terrifying dreams, cardiac disorders, paralysis, and disorders of speech, sight, or hearing (Merskey 1991). Several distinguished psychologists, including W.H. Myers, W.H.R. Rivers, William Brown and Bernard Hart, came to the conclusion that psychoanalytic concepts of repression and unconscious motivation, and therapeutic techniques derived from Breuer and Freud's treatment of hysteria, were of value in the diagnosis and treatment of war neuroses. By

19. For some case studies see O'Malley and Hall (1988).

endorsing these aspects of psychoanalysis and largely discarding Freud's work on sexuality, which seemed scarcely relevant to war neuroses, they laid the foundations for the "new psychology" which flourished in Britain between the wars (Hearnshaw 1964; Rose 1985).

The "new psychologists" constructed their theories from various combinations of ideas drawn from Freud, Jung, Adler, Janet and English writers such as William Trotter and William McDougall. Along with Freud's emphasis on sexuality, they also discarded his deep social pessimism: their theories "construed individuals as pre-organized towards social adjustment...the new psychology was to be a science of social contentment" (Rose 1985: 185). In peacetime, the "science of social contentment" extended the mandate of psychology and psychiatry from the identification and control of the insane to the treatment of neurosis, maladjustment and unhappiness in the family, the school and the workplace (Armstrong 1983; Miller 1986; Rose 1989). As we shall see in Chapter 6, the juvenile court provided particularly fertile ground for the growth of psychological expertise.

In addition to raising difficult medical issues, shellshock also posed a problem of legal responsibility, for the McNaughtan rules formed part of military law (War Office 1914). Defences of insanity were common in courts-martial for desertion and cowardice; and where a soldier was sentenced to death a medical board was convened if there was considered to be any doubt about his responsibility. Babington's (1993) study of all the cases where soldiers were executed from 1914-20 mentions many insanity pleas which received no support from army doctors and were rejected. What is not so clear is how often medical defences were accepted by courts martial or medical boards.²⁰ The Manual of Military Law (War Office 1914, Ch.7, para. 9) expounded the narrowest possible interpretation of the McNaughtan rules; and according to Robert Graves (1957 [1929]: 213) a secret order laid down that cowardice was always punishable with death, and "no medical excuses could be accepted."²¹ On the other hand, the eminent psychologist William Brown, who served as neurologist to the Fourth and Fifth Armies, told a War Office enquiry that he examined all alleged deserters in those armies who pleaded "shell-

20. The War Office enquiry (1922) commented on the lack of statistical information about courts-martial.

21. This may have been what the Darling Committee (1919, para. 67) had in mind when it stated that some officers had issued "instructions upon the subject of sentences which cannot be justified."

shock" and found it almost impossible to state decisively that they were responsible: "after my first two or three courts-martial, I found I was practically in every case giving evidence in favour of the man" (War Office 1922: 43-4). Brown (1927) claimed to have saved many lives in this way, and the fact that Babington (1993) does not mention a single case in which Brown was involved suggests that his patients did indeed escape execution, if not conviction.

By late 1917, so many soldiers were failing in their duty owing to shell-shock that it was impracticable to court-martial all of them (Stone 1985: 250). Moreover, army doctors found it impossible to distinguish "genuine" shellshock from malingering: Dr A.F. Hurst later admitted that "After much investigation ... he had come to the conclusion that the signs of genuine neurosis and simulation are identical" (War Office 1922: 24). What was needed was a way of avoiding such impossible judgments, while subjecting all "neurotic" soldiers to "firm disciplinary control". It was those doctors *who drew on psychoanalysis to explain and treat shellshock who* provided the solution (Stone 1985: 256). The symptoms of shellshock, like those of the malingerer, served the purpose of providing an escape from an intolerable situation; but it was a purpose of which the patient was unconscious. So while the shellshocked soldier should not be punished, neither should he be treated in a way which colluded with his unconscious motives, such as discharge from the army or transfer to a hospital in Britain.²² Firm military discipline was part of the treatment.

This approach to neurotic or hysterical behaviour involved a blurring of the concept of responsibility which might be convenient in the special situation of war, but had discomfiting implications for criminal justice. On the one hand, behaviour which could plausibly be explained as rational and culpable (desertion and malingering) might be the product of forces over which the subject had no conscious control. On the other hand, behaviour over which the subject had no conscious control might nevertheless be motivated and purposive on an unconscious level; and he could legitimately be "held responsible" for it in the sense that he should be expected to recognize and overcome his unconscious motives (and return to the front).

22. Bernard Hart, who before the war had emerged as an important and sympathetic commentator on psychoanalysis (see e.g. Hart 1910a, b), spelled this view out clearly in his evidence to the War Office enquiry (1922).

Psychoanalysis and Crime

Paradoxically, then, psychoanalysis provided plausible grounds for both restricting and extending the scope of criminal responsibility (Moore, 1984, discusses this problem at length). Freud himself grappled with this dilemma in a short paper on "Moral Responsibility for the Content of Dreams" (Freud 1961b [1925]). Morally, he argued, one must hold oneself responsible for the evil impulses revealed in dreams, recognising them as "part of my own being". But Freud did not suggest that this extended concept of responsibility could be translated into law:

The physician will leave it to the jurist to construct for social purposes a responsibility that is artificially limited to the metapsychological ego. It is notorious that the greatest difficulties are encountered by the attempts to derive from such a construction practical consequences which are not in contradiction to human feelings.

(Freud 1961b: 134)

William Brown reasoned along similar lines, in an article which drew on his war-time experiences as well as his sympathetic interest in Freud. Violent impulses, he suggested, were often the result of

strong repression of infantile sexual tendencies ... so that although the patient is not fully responsible for the act to which he at the moment appears to be impelled, he is in a sense responsible for the mental tendencies of earlier life which he had not at the time adequately faced. Often such responsibility is extremely slight; far less than the responsibility of the people concerned with his upbringing....The result towards which such investigations tend is not the abolition of [moral] responsibility, but its redistribution.

(Brown 1927: 137)

Freud's English disciple Edward Glover²³ was less circumspect in what he later admitted (Glover 1960: 35) was a poorly-received and counterproductive address to a summer-school for women magistrates in 1922, a time of keen, though not always friendly, public and press interest in psychoanalysis (see Rapp 1988). Freud's doctrines, Glover explained, implied that

23. For an account of Glover's career see Cordess (1992).

conscious conscience is not the main regulator of moral and ethical behaviour. Moral and social behaviour depend primarily on the smooth operation of unconscious codes, which have been laid down during the process of upbringing.

I am well aware that in asking you to accept these fundamental propositions I am putting a certain strain on your good nature and commonsense. Not only so, I must advise you that these propositions strike to the roots of the doctrine of 'criminal responsibility'Freud's work on unconscious guilt alone is sufficient to revolutionize the whole system of penal method.

(Glover 1960: 12-13, 17).

Freud (1990a [1915]) had suggested that some crimes were committed in order to relieve an obscure case of guilt, which in fact stemmed from the repressed parricidal and incestuous wishes of the Oedipus complex. These crimes were motivated by and unconscious desire for punishment. Freud's Totem and Taboo (1940 [1912-13]) argued that punishment was also rooted in unconscious guilt, in the sense that the urge to punish was prompted by a repressed desire to commit the forbidden act; a desire which in the case of capital punishment was gratified by actually committing the forbidden act under the guise of expiation.

The medico-legal implications of these ideas of Freud's were indeed profound. The image they suggested of abnormal crime was very different from the conventional psychiatric picture of "homicidal maniacs" and "moral imbeciles". The idea of the "criminal from a sense of guilt" was further developed by the famous child analyst Melanie Klein, who settled in England in 1926.²⁴ In an early paper (1948a [1927]) Klein suggested that sadistic murderers were not acting on some inexplicable quasi-epileptic impulse, but were acting out phantasies which were common in young "normal" children. And far from manifesting an innate lack of moral sense, "we must assume that it is the excessive severity and over-powering cruelty of the super-ego, not the weakness or want of it, as is usually supposed, which is responsible for the development of asocial and criminal persons" (Klein 1948b [1933]: 270).²⁵ Even more disturbingly, this warped super-ego was not necessarily the result of abnormally cruel or severe parenting, but developed

24. Other English contributions to the literature on the "criminal from a sense of guilt" include J. Glover (1924), Carroll (1940) and Foulkes (1944).

25. For Klein, however, this terrifying super-ego is a different thing from "conscience in the true sense of the word", into which it may develop (1948b: 271).

through a highly unpredictable interaction between the young child's actual relationships with its parents and its intense phantasy life.

The jurisprudential implications of Freud's ideas were explored in Vienna and Berlin by two psychoanalytically trained lawyers, Theodor Reik and Hugo Staub (the latter collaborating with Franz Alexander). Alexander and Staub produced an incisive critique of the medico-legal debates over responsibility, but also argued that there were good psychological reasons for holding some offenders responsible. Reik's view of punishment is less fully worked out but amounts to a form of what would now be termed abolitionism: "the direction in which the criminal law must develop [is] that of the eventual and complete elimination of punishment" and its replacement by some alternative mechanism of confession and absolution (Reik 1959 [1925]: 296-7).

Although a translation of Alexander and Staub's major work was published in England in 1931, as was Reik's The Unknown Murderer (1933), they appear to have made little impression²⁶ and they are mentioned here merely to indicate the critical potential of the psychoanalytic approach, in contrast to the actual trajectory taken by the psychoanalytic approach to crime in inter-war England, which was (Klein's work excepted) to serve as an adjunct to positivist criminology.

The two leading figures in English psychoanalytic criminology between the wars were Maurice Hamblin Smith and Grace Pailthorpe.²⁷ Smith was a prison doctor and taught the first academic course in criminology at the University of Birmingham (Garland 1988; Bowden 1990); Pailthorpe had served as an army surgeon before taking up psychoanalysis and embarking on her study of female offenders, initially under Smith's supervision, in 1922 (Rumney and Saville 1992). Smith shared some of the scepticism of fellow medical officers like East (1928) about the existence of a "criminal type" or types (Smith 1922b: 15). He nevertheless contrived to lure his

26. The leading English exponent of psychoanalytic criminology damned Alexander and Staub with faint praise: "The book should be useful, although it can hardly be described as profound." (Smith 1932b: 90.) Foulkes' (1944) exposition of the psychoanalytic view of crime did salute Reik's "outstanding" work, with which the magistrate Claud Mullins (1948) was also impressed.

27. Other notable figures included W. Rees-Thomas, the superintendent at Rampton (Rees-Thomas 1921; Watson 1988: 257 ff.), H.E. Field (1932) and John Rickman (1932). See also Garland (1988: 9)

reader into a medical model of crime by a simple non-sequitur:

We shall lay down the fundamental proposition that conduct is the direct result of mental life, that misconduct, like all other forms of conduct, results from mental causes. The particular act with which a man in Court is only a symptom produced by these mental causes....It follows that the real question is not so much what should be done to an offender in the way of punishment, but what can be done for him in the way of treatment.

(Smith 1922b: 21)

By using the word "symptom", Smith implies, without directly stating it, that the "mental causes" of crime (unlike, presumably, those of "all other forms of conduct") constitute something analogous to a disease. And if we accept that analogy, then "it follows" that crime, like disease, should be medically treated.²⁸ Pailthorpe is more direct:

When society has set a standard, any serious deviation from it is an indication of deficient adaptation capacity on the part of the individual to his surroundings, and therefore, of a biological deficiency. Regarded in this way it becomes plain that criminals and asocial persons should be looked upon as individuals who are suffering from psychological illness or defect.

(Pailthorpe 1932b: 23-4)

Pailthorpe recognized that "a considerable proportion of the population at large is criminal in the technical legal sense", and even argued (*echoing Freud 1961a [1930]: 112*) that "the acts punished by law are the more crude ones ... the more subtle acts of legally permitted robbery, violence and murder pass unnoticed" (1932b: 23, 37). But her research purported to prove that "93 per cent. of prisoners examined were, in some form or other, psychopathic either by psychological arrest in development, or through maladjustment and mental conflict, or through incipient psychoses" (1932b: 144). Since anyone who expressed a moral view with which Pailthorpe disagreed - for example that stealing to feed her child was preferable to the humiliation of applying for public assistance (1932a: 18) - seems to have been classed as a case of arrested

28. Burt (1927: 4) exploits the ambiguity of "symptom" in the same way. Gillespie (1930) and Rees (1933) similarly regard crime in general as a "symptom" of "maladaptation" or "faulty reaction" falling within the scope of psychological medicine.

"sentiment development", such findings are not entirely surprising.²⁹

Smith's approach was more conventional than Pailthorpe's. As a prison medical officer, he found psychoanalysis particularly useful in discussing the old problem of "impulsive" or "motiveless" crimes (see also Potts 1921). "Kleptomania", "dipsomania" and "homicidal mania" could now be classified as examples of "compulsion neurosis". For example:

Homicidal impulses, sometimes directed against a man's or woman's own children, may also occur. In this class of irresistible impulses, the impulse is, at first, resisted, the resistance gives rise to mental pain, the resistance is usually ineffective, the performance of the act is followed by a sense of relief. In all these cases there has been a conflict in early life which has given rise to a repression...Probably the repressed conflict is always of a sex character....The treatment is psychoanalysis.

(Smith 1922b: 110)

The first two sentences are an entirely conventional description of the distinguishing features of a genuine irresistible impulse (cf. East 1927: 358). Like wartime accounts of shell-shock, however, Smith's appropriation of psychoanalysis offered a middle way between regarding such actions as either rationally chosen or the product of a meaningless nervous discharge. The drawback of this explanation, from a forensic point of view, was its emphasis on sex, "one of the greatest obstacles", as Sir Cyril Burt observed (1944: 26) "to the acceptance of [Freud's] theories among the supporters of law, order and healthy morality". (As Glover discovered in 1922, an audience of magistrates was not best won over by spelling out the unconscious motives which a little girl who was jealous of her baby brother might have for stealing cucumbers and pencils!) Smith (1922b: 101-2) met this objection by arguing that for forensic purposes it was only necessary to recognize that sexuality "is of vast importance in the abnormal mind.... It is not necessary, for our present purpose, to discuss whether the sex instinct is of similar importance in the 'normal' mind."

In his discussion of responsibility, Smith started from a "hard determinist" position. He denied that there was any "entity called the 'will' which presides over the mind"; there were only

29. The Medical Research Council, who commissioned Pailthorpe's research, had serious reservations about her methodology, which led to a delay of three years in publishing it (Rumney and Saville 1992: 3).

"individual volitions", which, "like all other phenomena, are subject to natural laws" (*ibid*: 9). Like Ellis (1901), however, he was happy to use the word "responsibility" to refer to "the reaction of society to a given act". And if "society" chose to modify its reactions to a given act according to some such criterion as the McNaughtan Rules, "We may quite properly lend our assistance to a Court to help it decide" whether the Rules were satisfied (Smith 1922b: 10). Smith (1922b: 172) wrote that "Christianity forbids men to 'judge', deterministic science equally forbids them to 'blame' their fellow men", but he appears to have felt no qualms about his involvement in judicial killing. By taking the line that piecemeal reform would be worse than maintaining the status quo,³⁰ Smith was able to play the dual role of a radical critic of criminal law, advocating treatment in place of punishment, and a member of that fine "body of men (the medical officers of our larger prisons)...whose evidence is invariably regarded as being absolutely impartial, and as prompted by no consideration other than the administration of justice."³¹ As Norwood East put it, Smith's "theoretical inclinations never obtruded in his daily duties" (quoted by Garland 1988: 8).

Pailthorpe showed almost no interest in issues of responsibility. She considered it a mistake for reformers to concentrate on isolating the "worst and most hopeless cases" and treating them in special institutions. The function of psychoanalysis was to diagnose and treat the "mental conflict cases" who were - apart from the small number "accidental criminals" - the least abnormal offenders, "the potentially most valuable human beings" (1932a: 90-1). Whereas conventional prison psychiatry had concentrated on identifying offenders who were unsuitable for punishment (and could be regarded as less than fully responsible), Pailthorpe aimed at identifying those who were suitable for treatment - a classification which had nothing to do with any legal or moral definition of responsibility. Such treatment should be provided at a range of non-

30. See Smith (1933) and his evidence to the Select Committee on Capital Punishment (1930). Smith's contributions to the "irresistible impulse" debate will be considered in Ch. 5.

31. Smith (1932a). On the medical officer as witness see below, Ch. 5. For examples of Smith's own impeccably orthodox medical testimony in capital cases see Flavell (1926); Taylor (1929); Pugh (1930).

custodial clinics which could experiment with different psychological methods.³² There was also, however, a group of "psychopaths" who though not certifiable as insane should be segregated for the protection of society; and for these Pailthorpe (1932a: 46) suggested that "The term legal irresponsibility might be used to replace legal insanity and so avoid the invidious distinction between the 'sane' and the 'insane'."

A similar move away from a negative definition of the "weak-minded" prisoner as unsuitable for punishment towards identifying those who might benefit from treatment can be seen in the influential East-Hubert report of 1939. W.N. East was one of those who stressed the normality of most offenders, and he was impatient of what he saw as the extravagant claims of advocates of psychological approaches such as Pailthorpe (East 1936). But following a recommendation of the Departmental Committee on Persistent Offenders (1932), of which East was a member, he appointed Dr W.H. de B. Hubert to carry out an experimental programme of psychotherapy at Wormwood Scrubs prison. Hubert's method of therapy was clearly derived from Freud's (para. 90), but even its "complex" variant was much less time-consuming than full-blown psychoanalysis. As one reviewer commented, "Many might read into this methodology a tremendous concession on the part of orthodox Freudianism to the exigencies of a situation" (Strauss 1939: 167). Despite the report's claim to employ "scientific standards" instead of the unwarranted claims of other psychologists, it consists mainly of case studies in which the suitability of various individuals for treatment, and the benefit they derived from it, are assessed in a highly impressionistic manner. The report classifies male prisoners and borstal trainees according to a complex set of vaguely-defined criteria: suitability for prison; suitability for psychotherapy; suitability for other forms of psychiatric treatment; normality/abnormality; responsibility/irresponsibility; and culpability. The relationships among these concepts appear to be as follows:

Some abnormal offenders are responsible, others are not: this is a question of law.

Abnormal offenders who are responsible may be considered to be of diminished culpabil-

32. One such clinic, the "Psychopathic Clinic" opened in 1932 under Edward Glover, was set up by the Association for the Scientific Treatment of Crime (later the Institute for the Scientific Treatment of Delinquency) and largely inspired by Pailthorpe's work. Some of the most distinguished psychoanalysis and psychiatrists of the day gave their services voluntarily (Glover 1960; Rumney and Saville 1992: 10).

ity: this is a medical judgment (East 1939) and may be relevant to sentencing (para. 45).

Where offenders are markedly abnormal psychologically, there is usually (but not always) a close relationship between their abnormality and their offending (para. 97).

Many abnormal offenders are unsuitable for an ordinary prison environment, but they are not necessarily suitable for any form of psychiatric treatment (para. 97).

Some abnormal and some normal offenders are suitable for psychotherapy; some (a larger group: para. 163) for other forms of treatment; some for both; and others for neither. Not enough is known to lay down any firm criteria as to who is suitable for what (para. 161), although some rules of thumb are suggested: for example, homosexual men who are platonically friendly with women are probably untreatable (para. 117).

There is no clear boundary between normal and abnormal offenders (para. 98). Whether, for example, homosexuality is normal or abnormal is a matter of opinion (East 1936: 315).

The upshot of all this is that the issue of responsibility can safely be left to the judges, while still leaving great discretionary power in the hands of prison medical officers. The report's major recommendation is for a new institution within the prison system which would hold three categories of offender: those suitable for psychotherapy and/or general psychiatric treatment; "cases who require observation and investigation because of the presence of features that are unusual, abnormal, or the subject of special lines of research"; and those who are unsuitable for an ordinary prison regime. The institution would need to be firmly under medical control, for "There is reason to think ... that the future development of psychotherapy may be closely connected with the continued, detailed and expert observation and study of behaviour and the control, and modifiability at will, of the total environment of the patient during treatment which only psychiatric supervision can supply" (para. 162). After a delay of 23 years, this recommendation led to the opening of Grendon prison, which survives to this day as a (currently somewhat beleaguered) bastion of medical power within the prison system (Genders and Player 1995).

Conclusion

"Psychiatry has advanced in an amazing way in the last fifty years", Dennis Carroll proclaimed in 1938. Diseases could be diagnosed at an earlier stage, and treatments such as psychoanalysis

could be applied "with certain modifications" to many "anomalies of behaviour" which "would not ordinarily be regarded as diseases at all", but rather were reactions "to such stimuli as puberty, bad home conditions or economic stress" (Carroll 1939: 166). In the light of these advances, Carroll argued, the role of the psychiatrist should no longer be "restricted to the question of insanity and criminal responsibility." Rather, "the most useful function of the psychiatrist is in assisting the Court to decide what line of treatment, in the widest sense of the word, is most appropriate for the particular offender" (*ibid*: 168).

Carroll's discussion epitomizes what Johnstone (1996) has recently described (in a phrase borrowed from Foucault 1977) as the change in the role of psychiatrists "from experts in responsibility to advisers on punishment". Some of the more radical exponents of psychoanalysis and positivist criminology, such as Pailthorpe and Ellis, took this shift of concern to the length of dismissing the issue of responsibility as an irrelevance. But a more influential view, articulated most clearly by the Royal Commission on Mental Deficiency and in Norwood East's theory of "culpability", regarded questions of moral responsibility and punishment as closely related, and postulated a correspondence between degrees of culpability and scientifically measurable gradations of mental abnormality and deficiency. For adherents of this view, their new role as "advisers on punishment" did not entail that psychiatrists should no longer be "experts on responsibility". On the contrary, as we shall see in the next chapter, the period from 1908-39 was one of renewed conflict between different groups of experts on responsibility, and between those experts and the judiciary.

CHAPTER 5

IRRESISTIBLE IMPULSES AND IMMOVABLE JUDGES: THE INSANITY DEFENCE IN CAPITAL CASES, 1908-39

In the period between the establishment of the Court of Criminal Appeal and the outbreak of the Second World War, the conflicts within and between the legal and medical professions over the insanity defence intensified. Lawyers were divided between those who wanted to maintain the McNaughtan rules in their full rigour and those defence counsel and reformers who argued for new formulations designed to bring the legal definition of responsibility into line with their conceptions of moral culpability. The medical profession was divided between the prison medical service and the lunacy specialists, whose testimony often conflicted at controversial murder trials. By 1939 both the medical and legal views could claim some kind of victory. In formal terms, the Rules were firmly entrenched in binding judicial decisions. They failed, however, to arrest the gradual erosion of the death penalty, in which psychiatry played a leading role.

From 1900 to 1909 the number of murder defendants found guilty but insane was exactly equal to the number executed: 159 (24.1%). Over the next three decades the number of special verdicts remained almost level, as did the number of known murders of people aged one year and over, while the number of executions declined. From 1930-39 there were almost exactly twice as many special verdicts (168, or 30.8% of those charged with murder) as executions (85, or 15.6%).¹

Psychiatry contributed to this erosion of the death penalty not only through the special verdict but through findings of unfitness to plead (8.0% of those committed for trial for murder from 1900-9; 16.4% from 1930-9); the rare but controversial cases where a condemned defendant was found insane and respited to Broadmoor; and the commoner cases where sentences were commuted to penal servitude on medical grounds. Bowden (1991: 66) has calculated that from 1929-38 a total of 59.9% of those charged with murder avoided either conviction or execution on psychiatric grounds.

1. Home Office statement in Templewood (1951) Appendix 2. These figures, prepared in 1949, include the war years 1939-45 when the regular Criminal Statistics were not published.

In this chapter we shall follow the legal and political debate from the first case on insanity to reach the Court of Criminal Appeal, through a series of controversial murder trials to the setting-up of the Atkin Committee on crime and insanity, its recommendations and their rejection by the Home Office, Parliament and the courts. First, however, we shall examine a crucial factor underlying the debate, the division between the different groups of medical experts who testified in criminal cases.

Prison Doctors and other Experts

Edward Robinson's Just Murder (1947) is a study of 109 cases where persons of (in the author's view) doubtful sanity were tried for murder from 1919-39. Robinson's analysis is polemical and simplistic, portraying the McNaughtan Rules as a relic of mediaeval barbarism, but it does highlight one crucial point: the role of the prison medical service. When insanity defences failed, the prison doctor was usually a key witness for the prosecution. When such defences succeeded, it was either because the prison doctor supported them or because his evidence was rejected by the jury.

More recently, Sim (1990) has charted the growing power of the prison medical service. As we saw in Chapter 3, the increasing demand by the courts for medical reports on remand prisoners was at first resisted by the prison authorities, but later provided the opportunity for the prison doctors to develop a new form of expertise. In 1902 the Home Office issued an order to medical officers that they were to attend courts and be prepared to give evidence "in any case where a question is likely to arise with regard to a prisoner's mental condition". It is from this point that Sim (1990: 65) dates the doctors' "new found confidence in their role of experts". As we have seen (above: 89-90) that confidence grew with the official acceptance of prison doctors' knowledge of "weak minded prisoners", until Donkin (1915) felt entitled to declare that his prison service colleagues had "nothing to learn from lunacy specialists". By 1920, as Sim (1990: 63) observes, prison doctors "were attending conferences and publishing widely in the area of criminality and mental illness". Such publications, as the Prison Commissioners' report for 1925-6 points out, "deal largely with facts and do not, as a general rule" - i.e. with the exception of some of Hamblin Smith's work (see above: 102-5) - "start out to prove a theory - Freudian or

otherwise". When the doyen of prison-based criminology, W. Norwood East, took over as Medical Commissioner he re-emphasized the need for caution:

In conducting psychiatric investigations on law-breakers it is important to avoid any indication that undue emphasis is attached to abnormal conduct. To do so is to suggest morbidity to the criminally inclined, and the investigations will fail in their ultimate purpose if mental invalidism is encouraged. Society and the criminal are better served if the latter can be encouraged to cultivate a sense of social responsibility. The medical officers of the Prison Service are fully alive to this fact in their daily work and in their researches.

(Commissioners of Prisons 1931-2: 47)

From the legal point of view, East's was the acceptable face of psychiatry (Bowden 1991).

The procedural relationship between the prison doctor, the prosecution and the court was explained by a BMA Report in 1915. Where the doctor considered that any comment on a prisoner's mental condition was called for, he submitted a report to the Governor, who forwarded copies to the Prison Commissioners, the clerk of the Court where the prisoner was to be tried, and if the DPP was involved (as he was in all murder cases), to him. In some cases the Commissioners, at the DPP's request, would instruct the doctor to prepare a further report (BMA 1915: 121). Thus it was now the prison doctor rather than the local asylum superintendent who regularly offered his services as an impartial expert to the prosecution and the judge. As the barrister Donald Carswell² wrote in his perceptive introduction to the Notable British Trials volume on Ronald True:

in considering the policy to be adopted at the trial, the prosecution have regard to the reports of the prison doctor, and if they decide to press for a conviction, it usually means that they can rely on the prison doctor to support them in the witness box. When this happens the expert testimony given for the prosecution has a clear advantage in weight over the expert testimony for the defence; for the latter is called ad hoc, whereas the former is based on observations which may be faulty, but are certainly disinterested.

(Carswell 1925: 31.)

2. Carswell, a barrister who had given up practice for journalism (C. Carswell 1950: 12-13) and his father, the Scottish psychiatrist John Carswell, were both members of the Medico-Psychological Association's Criminal Responsibility Committee (Donald was its only lawyer), and took prominent roles in defending (D. Carswell 1924; J. Carswell 1925; Committee on Insanity and Crime 1924), and probably in writing, its report.

Robinson (1947: 17) questioned the disinterested character of prison doctors' evidence: "all are inevitably biased by the prison mind - that all men committed there are malingering." The ability to detect malingering was crucial to the prison doctors' claim to expertise (Watson 1994). East (1927) described some of the methods at their disposal in his authoritative Introduction to Forensic Psychiatry:

The accused should be kept under close observation day and night. If he alleges he suffers from insomnia he may be found to sleep well; an assumed expression may be seen to relax when the simulator thinks he is alone, and, although apparently listening to voices and attending to visions in the medical officer's room, he may read his book in comfort when he believes he is unwatched. It is a good plan to have a suspected malingerer in a ward with his bed some distance from the entrance, the medical officer can then observe him unawares as he visits the bed patients near the door.

(East 1927: 362.)

As East pointed out, such opportunities for observation were not available to experts called in from outside the prison.

It was not only the "prison mind" which tended to suspect malingering, but the legal mind as well. East himself was given a very rough ride by Avory J in the case of Iggulden (1924). Iggulden cut his lover's throat because, according to him, she repeatedly expressed a wish to die. East treated his belief that he was "doing her a service", and his apparent lack of desire to escape the death penalty, as evidence of insanity. Avory J accused East of "accepting as Gospel truth everything the prisoner said" and he asked the jury whether it was not "almost childish to rely on a man's statements in such circumstances" (quoted by O'Donnell 1935: 187-8). Iggulden was convicted, but sent to Broadmoor after a medical inquiry.

Two cases in which critics of the existing law believed the prison doctors' testimony had sent insane men to their deaths were Perry and Marjarem.³ It was clear that Perry was either mad, or exceptionally callous: he killed a family of four and then, by his own account, fell asleep

3. See Select Committee on Capital Punishment (1930), Q. 1791 (E. Roy Calvert on Perry); Howard League (1930). Robinson (1947, Ch. 7 and p. 200) lists 36 hangings where he considers there was evidence of mental abnormality; in most of the cases, however, this falls well short of indicating outright madness.

on their sofa. The medical witnesses for the defence included three of the leading psychiatrists of the day, T.B. Hyslop, Robert Armstrong-Jones and W.H.B. Stoddart.⁴ Armstrong-Jones, superintendent of the vast asylum at Claybury, testified that Perry

told him he had been wounded in the head by shrapnel, that he was blown up once by high explosives, and that when he was a prisoner the Turks [tortured him]. The only time he showed emotion was in describing his dreams in which he committed horrible deeds in the presence of his mother. In relating these he wept bitterly. He declared that he constantly heard voices commanding him to do things....He said he had no knowledge of his act for two days after it had happened, and that he was "put up" to it by voices....[Perry] was a congenitally unstable person suffering from aural hallucinations which were dominating, tyrannical, relentless. He did not think him capable of appreciating the nature of his acts.

(Times, 28 May 1919.)

The defence witnesses thought it was especially difficult to assess insanity in a prison environment,⁵ but the jury accepted the evidence of Dr Higson, the prison medical officer who considered Perry "of a low type of intelligence" but neither defective nor insane. In dismissing Perry's appeal, Reading LCJ commented that "The evidence of Dr Higson, who has had the best opportunity of observing him, is against the view that the appellant was suffering from delusions", whereas "the evidence of all the doctors called for the defence rests entirely on theories which they have formed from statements made to them or from their personal observations of the man" (14 Cr.App.R. at 55). Both forming theories and believing what one was told were seen as deeply suspect procedures. Perry was hanged.

The Marjarem case involved no conflict of medical evidence: all three expert witnesses were prison medical officers and all three agreed that he was sane when he stabbed a woman in the back on Dartford Heath. The defence relied mainly on the lack of obvious motive, Marjarem's history of violent behaviour since the age of five, and the fact that he had previously confessed falsely to another murder. Humphreys J told the jury that the medical witnesses "were skilled in the prison service, and had had special opportunities of studying men who were on the

4. Stoddart was one of the leading defenders of psychoanalysis, while Armstrong-Jones was one of its fiercest critics: see Pines (1991: 209-10, 219).

5. See Lancet (1919, 1: 1122).

border-line as many criminals were". Commenting on his execution, the editors of the Howard Journal (1930: 8) found it "difficult to resist the conclusion that if Marjarem had been a rich man's son he would now be receiving treatment in Broadmoor". Indeed, the rise of the prison doctor had largely reintroduced the economic inequality which the DPP's role in capital cases was supposed to have alleviated (see above: 64-6). Those who could afford to engage independent experts now stood a much better chance of substantiating a defence of insanity at the trial than those who had to rely on the prison doctor.⁶

The Atkin Committee (see below: 130-4) recognized this problem and recommended that it should be open to the defence, the prosecution or the magistrate who committed a case for trial to request a medical examination by an outside consultant, which "should take place at the expense of the State unless the accused could reasonably bear it" (Committee on Insanity and Crime 1923: 10). As we shall see, this proposal was rejected along with the rest of the Report.

Despite the advantages which the prison doctor's testimony enjoyed, other medical witnesses stood a good chance of success when they could appeal to the "common sense" of the jury. In Robinson's sample, the jury rejected the prison medical officer's evidence in 21 out of 28 cases where a special verdict was returned (1947: 200). One such case was that of Ernest Walker (1922), a 17-year-old footman who telephoned for a messenger-boy and murdered him on his arrival. He then travelled from London to Tonbridge, where he told a police officer "I think I have done a murder". A detailed "programme" for the murder (and Walker's suicide) was found at the scene. The defence was that Walker had committed the crime in an "epileptic equivalent" or post-epileptic state, and a Dr McNamara was called to support that view. In prison, however, Walker "was quick and industrious in his work, took an intelligent interest in reading books and papers, and associated freely with his fellow patients" - and he had no observable fits, although Dr East gave him a combination of drugs and food calculated to induce them.⁷ Despite East's testimony that he could find no sign of epilepsy or mental disease, the jury took only five minutes to find Walker guilty but insane. Hamblin Smith, who wrote the JMS's report of the

6. See for example Atherley (1909) and Robinson (1947: 59-60, 159-60).

7. See Sullivan (1924), 116 (for Walker's behaviour and treatment in prison) and 143 (for the technique used to test for epilepsy).

case, rather tactlessly expressed his agreement with the verdict, prompting a rejoinder by East (1922). East added, however, that he was "in sympathy" with the verdict, so perhaps his evidence was more equivocal than it appears from the available reports. Sullivan (1924: 116-7), under whose charge Walker came at Broadmoor, found no sign of epilepsy but thought the case consistent with dementia præcox.

Only exceptionally the prison medical officer to appear for the defence while another expert appeared for the prosecution. In the two trials of Edwin Thick in 1931 the two experts in forensic medicine who had examined the victim's body gave their opinions that the facts were inconsistent with the view of Dr Hamblin Smith (and, at the second trial, his Brixton colleague Dr Grierson) that the defendant had killed his wife in a state of automatism. The first jury failed to agree but the second accepted the prison doctors' view. I have not found any case where a lunacy specialist testified for the prosecution and a prison medical officer for the defence. Given their invariable identification with the defendant in cases where expert evidence conflicted, it is not surprising that the lunacy specialists stepped up their calls for reform of the law.

Trials and Appeals, 1908-1919

After numerous abortive attempts to establish a court of appeal for criminal cases, the notorious mistaken identity case of Adolph Beck finally led to the passing of the Criminal Appeal Act 1907. Under the original Act the court was to have consisted of eight Kings Bench judges appointed by the Lord Chief Justice, but by an amending Act in 1908, all the King's Bench judges became judges of the Court of Criminal Appeal (CCA). What this meant, of course, was that in each appeal where an error by the trial judge was alleged, three of the judges were sitting in judgment on one of their colleagues, knowing that in a future case the roles might be reversed.

The first insanity case to reach the new court produced a judgment almost as bizarre as the crime for which James Jefferson was tried. In May 1908, a man driving along the road from Leeds to Otley saw the 21-year-old labourer bending over the naked body of Elizabeth Todd; he had just cut off her head. The passer-by got help and returned to find Jefferson still hacking at the body. Before Jefferson was seized he picked up the dead woman's umbrella, corsets and hat. "I can get 7s. 6d. for the umbrella, 2s. 6d. for the corsets, and 1s. for the hat", he told his captors

(Times 20 July 1908).

Despite evidence that his insane delusions would make it impossible for him to attend to his trial, Jefferson was found fit to plead. He pleaded guilty, but the judge persuaded him to change his mind. The medical witnesses gave the sort of evidence which, as we saw in chapter 4, was usual in such cases. Jefferson knew he was killing a woman but his delusion that she was persecuting him "was so strong in his mind that all idea of right and wrong would be excluded" (Dr Edgerly); or "he knew he was doing wrong, but I think he had no idea how wrong (Dr Exley). Before most judges, such evidence coupled with such bizarre facts would almost certainly have secured a special verdict; but Bigham J, a judge more accustomed to commercial cases, directed the jury in accordance with the very letter of the M'Naughtan Rules. "If there is any doubt, is he not entitled to the benefit of it?", asked a juror.

"No; it is the other way on. He must satisfy you beyond all reasonable doubt that he did not know he was doing wrong."

"If he knew he was doing wrong, but was insane, how then?"

"If he knew he was doing wrong it does matter how insane he was, he is guilty."

The jury still took an hour and a half to convict. At the appeal, Jefferson's counsel tried to argue that the finding of fitness to plead was wrong, but the Court pointed out that the Act gave no right to challenge such a finding. Prosecuting counsel accepted that the verdict could not be considered satisfactory. In a brief judgment, Lawrence J announced that the Court would exercise its power under s. 5 (4) of the 1907 Act to substitute a special verdict - not because there was anything wrong with the judge's directions, but because the jury, despite "very strong evidence ... that this man ... was not in a state of mind to make him responsible for his actions" had reached the wrong decision.⁸ The fact that the judge had virtually directed them to convict was of no consequence.

The Court had started as it meant to go on. It would not, if it could help it, either criticize a summing-up on insanity or grapple with a difficult legal issue (for example, was Bigham J right to set "beyond reasonable doubt" as the standard of proof for an insanity defence? - a question it

8. (1908) 1 Cr.App.R. at 97.

was left to the Privy Council to settle in Sodeman, 1935).⁹ In one respect, Jefferson was an uncharacteristically bold decision, since the Court exercised its power to amend the verdict.¹⁰ Its usual line in the early years was that the decision whether the death sentence on an alleged lunatic should stand was best left to the Home Secretary.¹¹ In some cases, however, it would formally recommend to the Home Secretary that a medical enquiry ought to be held,¹² and even give a public hint as to what the result should be.¹³ By 1913 the Court's practice had hardened into a rule that the power of substituting a special verdict would be used only in "special cases",¹⁴ since the "Secretary of State has a better opportunity of making enquiries and getting good advice than we have" (Law, 1913, at 247). In non-capital cases the Court took the view that it was not in the defendant's own interests to allow an appeal on the ground of insanity, as this would lead to indeterminate detention in the place of imprisonment.¹⁵

The case of Victor Jones (1910) did suggest some hope that the Court might some day review the insanity defence. Jones had murdered his sweetheart after she got engaged to another man. The evidence of insanity was not strong, but his counsel urged the Court to take account of "the great advance in medical science since 1843, and the development of legal theory as to the true limits of responsibility", and to reinterpret the insanity defence on the lines suggested by Stephen (1883). At this point Channell J made an apparently sympathetic intervention: had not Stephen laid down the same principle even more strongly in a reported case which Channell J

9. It held that the correct standard was the civil one.

10. It did so again in Gilbert (1914), and again declined to comment on the judge's summing-up.

11. Macdonald (1908); Jesshope (1910); Loake (1911).

12. Lumb (1912); Boss (1921); PRO: HO 144/21740/1.

13. e.g. Atherley (1908); Coelho (1913); and J.W. Smith (1910), where it was suggested that the victim had boasted of driving the murderer, her husband, "dotty". But in Harper (1913) the Court stated that it was not entitled to express an opinion on the exercise of the prerogative of mercy.

14. McLaren (1913); Alexander (1913).

15. Dench (1909), de Vere (1909). In Simpson (1910) the Court generously increased the appellant's sentence, remarking that if he was insane he would be carefully watched and treated.

himself had followed?¹⁶ The judgment of the Court, given by Alverstone CJ,¹⁷ concluded that it had not been established that Jones had been unable to exercise self-control, and there was therefore no need to decide whether an insane lack of self-control was a defence:

A grave responsibility will lie upon this Court whenever it shall become necessary to decide those large and important questions which have been raised in the argument of appellant's counsel; when that day comes, the Court will not shrink from the duty of deciding those matters of controversy and declaring the law, but in this case they do not arise.

(4 Cr.App.R. at 217-8.)

The Court was again asked to rule on the issue of self-control in Coelho (1914) and again declined to do so. Coleridge J's interventions in the argument suggest that he, at least, was opposed to making lack of self-control a defence. In Codère (1916), the defence tried a different tack, arguing that either the knowledge of the "quality" of the act or knowledge that it was "wrong" involved an appreciation of its moral quality or wrongness. The Court fudged the issue: "In a case of this kind, namely, killing, it does not seem debatable that the appellant could have thought that the act was not morally wrong, judged by the ordinary standards, when the act is punishable by law, and is known by him to be punishable by law" (12 Cr.App.R. at 27).

Just how debatable this assumption became apparent in two murder trials in 1919. Lieut.-Col. Rutherford shot a family friend because, according to him, he considered him a bad influence on his children, but more likely because he thought he was his wife's lover. Arthur Pank (1919) thought his sister-in-law had made a sexual suggestion to him and shot her in the belief he was justifiably defending his brother's honour. Considering the public support at this time for the "unwritten law" that a soldier was entitled to kill an unfaithful wife or lover,¹⁸ neither man would have had to be very mad to think that what they were doing was justified by

16. Davis (1881) followed by Channell J in Kay (1904). See above: 33, 71.

17. The Criminal Appeal Act 1907, s. 1(5) laid down that although separate judgments could be given on a question of law, there should normally be a single judgment of the court. Differences of judicial approach are therefore harder to detect than in other appellate courts.

18. See Wilson (1986: 723) who cites the case of a wife-killer who was bound over when convicted of manslaughter on the ground that this was "such punishment as a reasoned and instructed public opinion would believe to be fitting". The Lancet (1919a) and Greer J (Medico-Legal Society 1926: 36) both expressed anxiety about medical testimony being used to collude with this "unwritten law".

prevailing moral standards.

The trial judges in these two cases took very different views. In Rutherford's trial neither Salter J nor the prosecution (so far as appears from the very detailed report in The Times) made any attempt to press the point that even if Rutherford thought he was doing what was right, he knew he was breaking the law. Unusually, the judge expressed his agreement with verdict of "guilty but insane". But in Pank's case Darling J laid down the law in uncompromising, if somewhat eccentric, terms.¹⁹ "It was most necessary that it should be known what insanity in the legal sense was, and to uphold it, because there were no end of people now who were trying to trifle it away and to allow persons in certain circumstances, and especially those in khaki, to kill others with little or no excuse." He compared Pank to Nurse Cavell, who had been canonized by wartime propagandists after the German authorities shot her for helping British soldiers escape from occupied Belgium. She knew she was breaking German law, but she said she had a higher duty "and she did it and took the consequences. The jury might say if they liked that she was justified in doing it, but she would not have said, and they must not say, that she was not doing wrong against the German law." So even if Pank's alleged insane delusions led him to suppose that he was obeying "the unwritten law", he was still guilty under the McNaughtan Rules. Pank was convicted, but reprieved.

The CCA also generated considerable confusion about the scope of its own powers. Under the 1907 Act anyone convicted on a trial on indictment could appeal: did this include a person found guilty but insane? In Ireland (1910) the Court held that the special verdict amounted to a conviction, so an appeal was possible. In McHardy (1911) it was held that Ireland applied only to the part of the special verdict which found the defendant guilty of the act charged; the finding of insanity was "a finding of the jury in aid of the prisoner and for his relief" (even if, like McHardy, the prisoner had not asked for it), so no appeal was possible. In Felstead (1914) the House of Lords overruled Ireland and held that the verdict of "guilty but insane" was really an acquittal. The main judgment was given by Reading CJ, but the following year in Taylor

19. Darling J was a noted judicial "character". His appointment in 1897 caused great controversy because it was so blatantly a reward for his services as a Conservative MP. Though considered a good trial judge he was notorious for his witticisms, which were not always deemed fitting to the solemnity of the occasion. See Walker-Smith (1938), Laski (1949), Heuston (1964: 65-6).

(1915) he admitted that the Act had "given rise to unforeseen difficulties which could only be remedied by the legislature", making it impossible to interfere with a verdict of guilty but insane which was arrived at despite the defendant's plea of "guilty" to unlawful wounding. In the same year the BMA Committee on Criminal Responsibility called for a right of appeal to be introduced, despite the BMJ's (1914) view that the Felstead decision "to put it at its lowest, convenient" since it reduced the risk of controversial medical evidence being challenged.

Shell-Shock, Syphilis and Science: The Holt case

If the CCA under Lord Reading CJ - the man described by his biographer (Judd 1982: 113) as "probably the least active and attentive Lord Chief Justice in England's history"²⁰ - had ever been minded to come off the fence concerning the law on "irresistible impulse", the case of Frederick Rothwell Holt would have been the occasion to do it. On the face of it, the case could not have been simpler.²¹ The body of Holt's lover, Kitty Breaks, was found in sand-dunes near Blackpool with three revolver-wounds in her body. Holt's revolver and gloves were found nearby, along with a trail of footprints matching his shoes. Holt, an insurance agent, had tried unsuccessfully to insure Kitty's life for the enormous sum of £10,000;²² she, though poor, had insured her own life for £5,000 in his favour and at his expense, and had left what little she possessed to him in a recent will.

While awaiting trial, Holt accused the police of persecuting him with dogs, fever-infected flies and mercury-filled bullets, but would give no useful instructions to his solicitor. After much hesitation, the defence decided to raise the issue of his fitness to plead. They called medical evidence of his insanity but the jury rejected it; apparently they were more impressed by the prison doctor's testimony that Holt had asked to see a solicitor before he would consent to a

20. Reading (formerly Sir Rufus Isaacs) spent much of his time as Chief Justice on diplomatic missions on behalf of the wartime government, leaving the less-than-brilliant Darling J to preside over the Court. Shortly after deciding Holt he became Viceroy of India and the elderly A.T. Lawrence J was appointed (as Lord Trevethin) to keep the Chief Justice's seat warm until Gordon Hewart, the Attorney-General, could be spared from his political duties. In 1922 Trevethin "read of his own resignation in The Times" and Hewart was installed (Jackson 1959: 144).

21. The following account is based mainly on Marjoribanks (1929, 1950) and The Times (28 Feb. 1920). Jackson (1959: 99-105) gives the prosecution's point of view.

22. At 1924 rates, this was equivalent to an average bank clerk's salary for 35 years (Stevenson 1984: 122).

medical examination. Marshall Hall, who led the defence, had feared that a finding of fitness to plead would prejudice the defence of insanity. Indeed it could hardly fail to do so since the new jury which was sworn to try Holt had been in court throughout the preliminary hearing. (It is difficult to understand why this point was not raised on appeal.) Hall now faced the task of running two ill-matched defences together: an alibi provided by Holt's family, and insanity. The medical witnesses were not recalled, and Hall relied on his legendary rhetorical skills to give some substance to a defence which rested on three main points. One was that for a man to have displayed the affection, and written the love-letters, that Holt did to Kitty Breaks while all the time coldly planning to murder her was "so vile" that "for the honour of our sex", the jury should find it was impossible.²³ Secondly, as was virtually standard practice in such cases, the defence produced evidence of a couple of insane relatives - in this case a grandfather and first cousin. Thirdly, the defence invoked the theory of shell-shock: "A man like the prisoner, who has been in France, and subjected to the nerve-racking experience of the Festubert bombardment - a man who is neurasthenic, and has suffered from loss of memory and depression - is the very man who might at any moment go mad"²⁴ - and kill Kitty Breaks in a moment of jealousy. Greer J's summing up pointed out the "remarkable absence of evidence in support of the plea of insanity" but left open the possibility of acquittal if Holt had been seized by an "uncontrollable impulse".²⁵ Holt was convicted.

On the last day of the trial, a telegram reached Marshall Hall which provided, too late for him to use it, a crucial piece of medical evidence. It was from a doctor who had treated Holt for syphilis in the Malay Straits, and who suggested that he was now in the early stages of general paralysis of the insane. That this degenerative and invariably fatal disease of the brain was the result of syphilis had long been suspected (e.g. Dawson 1898) but not until 1913 had Noguchi

23. Although the Sex Disqualification (Removal) Act 1919 had recently allowed women to serve as jurors, Hall's remarks - and especially his animadversions on the female spectators - give the impression that the jury was all male.

24. Quoted by Marjoribanks (1950: 322). Holt's neurasthenia, amnesia and depression were confirmed by findings of Army medical boards (Dean 1993: 74-5).

25. According to Greer J in True (1922) Cr.App.R. at 167, he directed the jury that if they found Holt's will power was destroyed by disease they might conclude that he had also lost the power of knowing what he was doing or that it was wrong.

and Moore furnished what was regarded as conclusive proof.²⁶ The defence asked the CCA to order that a lumbar puncture - a recently introduced procedure to determine whether the cerebro-spinal fluid was infected with syphilis - be carried out.²⁷ The Lord Chief Justice's reaction bordered on the contemptuous:

There is no evidence of the applicant's condition at the time of the murder. We are now asked to indulge in a speculative discussion with regard to the effect syphilis may have had on the applicant. How can the Court be asked to act on evidence of that sort? It means that the doctor goes into the witness box to speak not of fact, but of theory. How can the Court, upon such speculative discussion, decide whether the man at the time of the murder was in a condition of mind to know the difference between right and wrong?

(14 Cr.App.R. at 153-4)

The defence was, however, allowed to call the Malay Straits doctor as a witness at the appeal, as well as recalling one of the original witnesses to support the general paralysis theory. Hall urged the court to consider the new evidence not in the light of the usual interpretation of the McNaughtan rules, which was "inconsistent with current scientific opinion", but on the basis of the rules "as interpreted, or perhaps extended, by Stephen". He cited recent decisions by Darling J (Hay, 1911) and Bray J (Fryer, 1915),²⁸ as well as a South African case (Hay, 1899) and the Queensland, French and German penal codes, in support of this position.

In what seems a wilfully obtuse judgment, Reading L.C.J. said that it was unnecessary to consider whether the McNaughtan rules should be enlarged because Greer J had left "uncontrollable impulse" to the jury. But he also said that "The tests in MacNaughten's case must be observed", and the "hypothetical speculations" which the court had heard did not amount to evidence of insanity within the rules. On the basis of the medical literature at the time (Sullivan 1902, 1924; Baker 1904), the "speculation" that Holt's behaviour was symptomatic of general

26. Noguchi and Moore (1987). For the history of general paralysis see Thompson (1988), Quétel (1990).

27. Under the Criminal Appeal Act 1907 s. 9 (d).

28. Bray J had explicitly adopted Stephen's test: (1915) 24 Cox C.C. at 405. Darling J had simply told the jury to acquit Hay if they accepted the prison doctor's evidence: whether this amounted to acceptance of "uncontrollable impulse" depended on what exactly the witness had said. See True (1922) 16 Cr.App.R. at 166 (argument of Sir Richard Muir).

paralysis was a very plausible one. It was well known that the crimes of general paralytics were typically acquisitive; they might show a certain cunning but were marked by an over-optimistic "silliness", for example the forging of cheques for preposterously large sums (Sullivan 1924: 31). Sometimes, though rarely, these acquisitive schemes could lead to murder; Sullivan (1924: 34-6) cites (anonymously) the case of Sherwood (1922), who brutally killed an old woman the course of robbery, was reprieved from execution and died of general paralysis a year later.²⁹ Holt's crime displayed just such "silliness", particularly in "the absurd over-insurance" of Kitty Breaks' life (Marjoribanks 1950: 326). Moreover his delusions of being followed and poisoned (with mercury, which he had been prescribed as an antidote to syphilis) were quite consistent with general paralysis (cf. Baker 1904: 440). This was just the sort of case where a jury with all the evidence before it, and directed on the lines proposed by Stephen, might have concluded that the defendant's power of self control was so impaired that he did not truly "know that what he was doing was wrong". It was this point which the appeal judges could not or would not grasp.

Dean (1993) gives Holt's case a central place in what is, so far as I know, the only attempt to explain sociologically the judges' resistance to the extension of the insanity defence at this time. Dean argues that while shell-shocked soldiers were at first an object of sympathy, public attitudes sharply changed once they began to be blamed for the supposed post-war crime wave. The courts then became increasingly hostile to shell-shock and psychiatric defences in general. Although Dean is right to draw attention to the resistance which the "new psychology" encountered both in the press and in the courts, there is little reason to suppose that "concern over dangerous shell-shocked veterans influenced the issue of possible reform of the insanity defence" (*ibid*: 73). The statistics cited above on murder trials from the 1900s to the 1930s do not indicate a more punitive attitude on the part of juries. The trial judges' summings-up in Jolly (1919), Holt, Quarmby (1921) and True (1922) were consistent with those in Hay (1911) and Fryer (1915) which Dean cites as showing a more generous judicial attitude before and at the beginning of the war. The appeal in Holt centred on general paralysis, not shell-shock, and by Dean's own admission none of the other leading cases was directly related to shell-shock. The

29. See PRO HO 144/21740/1. Like Holt, Sherwood left his gloves at the scene but nevertheless pleaded an alibi.

CCA's attitude in Holt and Quarmby was also consistent with its pre-war decisions; from True onwards it was presided over by a Chief Justice vehemently opposed to any extension of the insanity defence, but one who in at least one case (Lloyd, 1927: see below), showed remarkable generosity to a shell-shock victim. The only two notable murder trials where judicial hostility to shell-shock as an excuse may possibly have played a part were Perry (1919) and Pank (1919), which Darling J conducted around the same time that he chaired a War Office committee which sought to reassure the public about the execution of "shell-shocked" deserters (Darling Committee 1919; Babington 1993: 193-6).

What the Holt decision in fact illustrates is, firstly, the CCA's reluctance to curb the judges' discretion by either endorsing or criticising summings-up which stretched the McNaghten rules as Greer J had; and secondly, a determination that the autonomy of the legal view of insanity would not be sacrificed to the "speculations of medical science". As Darling J put it, "We take the law of England from the King's Bench, and not from Harley-street" (Bartlett, 1920). The intense but not predominantly friendly press and public interest in psychoanalysis in the first few years of peace (Rapp 1988) contributed to the image of medical psychology as "a shifting thing, affected by every new book", in contrast to the "common sense" of the law.³⁰ In Quarmby (1921) a "mental specialist" claimed to have taken a murderer's subconscious mind³¹ back under hypnosis to the time of the crime, and found that he was swayed by an uncontrollable impulse. The judges were no more impressed by the "new psychology" than they had been by biological explanations of general paralysis:

Darling J: Has it ever been recognised in these courts that there are two minds, one conscious and the other sub-conscious? - [Counsel:] The courts are slow to recognise things of that sort... the learned judge at the trial did not seem to understand the meaning of the word "sublimation" or the term "the emotion of the circumstances." The medical expert said that there were separate chambers of the mind.

Darling J: How do they know?

Avory J: What is the meaning of "all that which is below the surface of the

30. Editorial, Evening Standard 27 Nov. 1923.

31. A term used in the "New Psychology" (e.g. Munsterberg 1909) but disliked by psychoanalysts who distinguished between the "unconscious" and the "preconscious" (Foulkes 1944).

water is the sub-conscious"? Does it mean that which is at the bottom of the sea? - There were promptings beneath the surface.

Darling J: Would you separate the waters which are below the firmament from the waters which are above the firmament and let the dry land appear? (Laughter.)

(Quoted in Robinson 1947: 51)

The upshot of all this levity was that Quarmby - who had cut his mistress's throat and almost beheaded her - was hanged.

The Case of Ronald True

True's case in 1922, like Rutherford's three years earlier, was a sensational murder trial involving a defendant of relatively high social standing. It was, perhaps, a sense that the rich must not appear to escape their just deserts which prompted the prosecution in both cases to press for convictions in the face of the unanimous view of the medical witnesses that the prisoners were insane. Whereas Rutherford had a distinguished war record, True, an eccentric young drifter and morphine addict who lived off his wealthy mother, had no such redeeming feature. He had brutally murdered a prostitute called Gertrude Yates and stolen her jewellery, and the prosecution strove to uphold a strict definition of insanity with a determination which had not been apparent in Rutherford's trial.

The defence of insanity was supported by Norwood East, the Senior Medical Officer of Brixton, not on the ground of irresistible impulse,³² but on the ground that True had no understanding of moral right and wrong: he had always been deficient in "moral sense", and his morphine addiction, combined with head injuries and possibly syphilis, had led to outright insanity. Although the condition the medical witnesses ascribed to True closely resembled "moral imbecility", they avoided using the term and described his condition as one of certifiable insanity rather than mental deficiency.³³ The two lunacy experts, Drs Smith and Stoddart, who examined

32. Carswell (1925: 145, evidence of Dr East).

33. See for example Dr East, *ibid.*, p. 162; Dr Young, p. 178; Dr Smith, p. 186. Carswell (1925: 32) mentions that a fifth expert, instructed by the prosecution but not called at the trial, considered True mentally defective rather than insane: presumably this was on the ground of moral imbecility.

True agreed with East's diagnosis but also considered that True could not control his actions.³⁴ All the experts conceded, however, that he knew what he was doing and that it was wrong according to law and the "ordinary views of mankind".³⁵ The prosecution therefore argued that True was clearly sane according to the M'Naughtan rules as interpreted in Codère (1916).

After lengthy submissions from counsel (heard in the presence of the jury), McCardie J directed the jury to find True insane if they accepted that as a result of mental disease he was not aware of the physical nature and quality of his act; or "did not know that what he was doing was morally wrong according to the standard of his normal fellow-citizens"; or was "deprived of the power of controlling his actions", or acted "whilst in an actual epileptic seizure". He nevertheless advised the jury to treat the self-control test "with great care; it would never do to diminish unduly the doctrine of responsibility for criminal acts."³⁶ It was a direction in the spirit, and close to the letter, of Stephen's works, on which defence counsel had drawn in his submissions.³⁷ The jury, as McCardie J had fairly clearly hinted they should, found True guilty.

The defence had relied on the familiar argument that the M'Naughtan Rules should be extended in light of "the advance of medical knowledge",³⁸ and this theme was taken up in press comments on the case. The Daily News (6 May 1922) accepted that "the time seems to have come when more exact and scientific tests should be applied", the Daily Telegraph's legal correspondent (8 May 1922) accused the law of "lagging unduly behind the discoveries of science", and "Templar" of the Daily Chronicle (8 May 1922) opined that "our law should give effect to the best that is known and understood of the world." The Times (6 May 1922), on the other hand, complained that a "pathological campaign" was being waged against the M'Naughtan Rules, which, "no doubt, are not scientifically perfect, but they provide excellent working rules for the

34. Dr Smith, ibid. p. 184; Dr Stoddart, p. 191. Dr Young thought that "where a man is deficient in moral sense, he is also incapable of controlling his principal instinctive actions" (p. 179).

35. Dr East, ibid., p. 168; Dr Smith, p. 184; Dr Stoddart, p. 194. Dr Young (p. 180) simply said that he agreed with Dr East.

36. ibid., 253-4 (my emphasis).

37. Sir H. Curtis-Bennet, ibid., pp. 200-1.

38. Curtis-Bennet, ibid., p. 199.

protection of society"; while the Manchester Guardian's medical correspondent thought that theories of "masked epilepsy" and Freudian "complexes" were too easily exploited by the defence.

Since McCardie J had accepted most of his original submission, defence counsel tried to go even further at the appeal, and argue that "If a man is certifiably insane, he should not in law be held responsible for his actions." He then fell back, however, on the self-control test, arguing that "in this case, the issue calls for pronouncement." He did not complain of the judge's ruling on the law but of its application to the evidence: "The jury should have been directed that they were bound to accept, and act upon, the uncontradicted evidence of the doctors. The whole of our lunacy law is founded on medical opinion." (16 Cr.App.R. at 166-7.) In one of his first judgments as Lord Chief Justice, the Court made its clearest pronouncement yet, though not the one the defence had hoped for:

It is conceivable that the rule ... in McNaughton's Case may on some future occasion be further considered. Much that is excellent is, in the result, further considered and, in the result, confirmed. It is enough to say that in the view of this Court there is no foundation for the suggestion that the rule ... has been in any sense relaxed. Those who seek to rely upon individual passages in this or that summing-up should not omit to observe that, as the law now stands, the prosecution has no appeal to this Court.

(16 Cr.App.R. at 170.)

The judgment ended, however, with a hint that the Home Secretary might exercise his powers. Dr Sullivan of Broadmoor and two other doctors examined True and found him to be certifiably insane. The precise grounds are not clear but in July 1923, when True was a patient in Broadmoor, Sullivan reported that he was a moral imbecile.³⁹ The Home Secretary's decision to respite⁴⁰ True's sentence caused great controversy, largely because he refused, despite a strong recommendation to mercy from the jury, to commute the death sentence which McCardie J had passed the previous week on an 18-year old hotel worker called Jacoby for the murder of an

39. Letter from Sir Ernley Blackwell, to Sir Claude Schuster, 6 Nov. 1923, in PRO HO 144/21740/1.

40. Technically a respite was a postponement of sentence, not a reprieve (Shortt 1923). When asked what would happen if a person in True's position regained his sanity, the Home Secretary said he could be remitted to prison, but did not mention the theoretical possibility that he could be hanged (Hansard, 19 June 1922, col. 839).

elderly guest (see Bresler 1965, Ch. 15; Rowland 1965, Ch. 2). It was a "case of one law for the rich and another for the poor",⁴¹ under an unpopular coalition government which had failed to prevent the revival of class antagonisms which had been temporarily masked by war (Morgan 1978: Ch. 12). Avory J publicly criticized True's reprieve for undermining deterrence.⁴² The Home Secretary, Edward Shortt K.C., made a statement in the House of Commons, pointing out that where evidence of insanity had been brought to his attention, as it had in this case both by the trial judge and the CCA, he was obliged by the Criminal Lunatics Act 1884 to order a medical inquiry; and that by common law if a man was found to be *insane he could not be hanged*.⁴³ In a subsequent debate Major Entwistle, M.P., challenged Shortt's reasoning. The 1884 Act, he argued, left the Home Secretary with a discretion whether to act on a medical inquiry's report; and the common law rule only applied to a prisoner who became so mad that he could not "make his peace with God", not to anyone who was deemed certifiably insane. Shortt replied that the 1884 Act had not been intended to alter the common law, but he failed to deal with Entwistle's point about the common law.⁴⁴ To judge by a speech he subsequently made to the Medico-Legal Society, Shortt's position on this issue was confused:

When ... it came to the question of [True's] execution, it became purely a medical matter. There was, in this country, a perfectly clear definition that a person who was not in a mental condition to put forward any reason why he should not be executed, had not to be executed whilst he was in that condition. The question considered by the commission which sat upon the True case and which decided that he was not in a position to make his peace with God had no relation whatever to the question of his insanity at the time he committed the crime.

(Shortt 1923: 22)

The two reasons which Shortt gave why an insane person should not be executed were in accordance with the eighteenth-century authorities he had cited in his Commons statement, but whether True was "in a position to make his peace with God" was a spiritual and not a medical

41. The Star, quoted by Bresler (1965: 151).

42. Charge to the Exeter Grand Jury, quoted in O'Donnell (1935: 10).

43. Hansard, 23 June 1923, cols. 201-5, reprinted in Carswell (1925), Appendix IV.

44. Hansard, 29 June 1922, cols. 2,421-2,437.

question, and it is most unlikely that the medical report addressed it.⁴⁵ One hint of True's spiritual condition has survived, in the form of a farewell letter he wrote after the failure of his appeal: "Cheerio! old nut, and if you come to the same place as I'm going I'll have a drink of nice cold water ready for you on your arrival." (Carswell 1925: 295.)

The Atkin Committee

On July 10 1922, less than a fortnight after the Commons debate, the Lord Chancellor set up a committee to consider the law, practice and procedure relating to the insanity defence and to the removal of condemned prisoners to asylums. The members were all lawyers or civil servants: the Attorney-General, Solicitor General and Director of Public Prosecutions; Sir Richard Muir, who had led the prosecution of True; Fitzjames Stephen's son Sir Herbert, who had officiated at Holt's trial as Clerk of Assize; and Sir Edward Troup and Sir Ernley Blackwell, respectively Permanent Under-Secretary (recently retired) and Assistant Under-Secretary at the Home Office. The Chairman was Atkin LJ, who had given some indication of his views when he was President of the Medico-Legal Society⁴⁶ in 1920-21: "There ought to be some change in the formula laid down in Macnaughten's case...[but] it is no use criticising [that] formula ... unless you can substitute some effective formula in its place which will not have the effect of removing all prisoners from a gaol to an asylum" (Atkin 1920: 6-7). The Committee was one, then, which could be safely expected to recommend some modest reform but not to mount any fundamental challenge to the existing law. Subsequently, perhaps to give a better impression of balance, Holt's defence counsel Sir Edward Marshall Hall was added to the Committee.

The evidence to Atkin was indicative of the growing divisions within the medical profession. The British Medical Association submitted a report which had been prepared in 1915 after consultation with the Bar Council and the Law Society (Burrows 1915: 106). Its main authors appear to have been James Scott, a prison medical officer, and Rowland Burrows, a barrister.⁴⁷

45. None of the medical reports on condemned prisoners which I have read in the Public Records Office addresses this question or any other common-law test.

46. Atkin (1923: 25) attributed his appointment to his connection with the Society.

47. See their preliminary reports published as appendices to the BMA report (1915: 116-126).

It proposed to modify the M'Naughtan Rules on lines suggested by Mercier (that the accused should "appreciate" the nature, quality and wrongness of the act) and Stephen (the self-control test):

No act is a crime if the person who does it is at the time when it is done is prevented either by defective mental power or by any disease affecting the mind -

(a) From knowing and appreciating the nature and quality of his act, or the circumstances in which it is done; or

(b) From knowing and appreciating that the act is wrong; or

(c) From controlling his own conduct, unless the absence of the power of control has been produced by his own default.

N.B. - "Wrong" means morally wrong or illegal.

(BMA 1915, para. 7)

The BMA committee, in apparent ignorance of the principles of statutory drafting,⁴⁸ believed that this form of words did not exclude other conditions being treated as a defence "if suggested by the progress of human knowledge" (BMA 1915, para. 8; Burrows 1915: 107).

The report submitted by the Medico-Psychological Association was the work of a committee which included many leading members of the psychiatric establishment, including the past and current Superintendents of Broadmoor (David Nicolson and W.C. Sullivan), their counterpart at Rampton (Rees Thomas) the mental deficiency experts W. Landgon-Down and A.F. Tredgold, and the retired Prison Commissioner Sir Bryan Donkin. Nevertheless it took a much more radical position. It assumed (without any historical foundation) that "the judges framed the M'Naghton Rules in accordance with what they were advised was the generally accepted medical view of insanity." The Rules, it argued, should now be abrogated because they were founded on

a conception of unsoundness of mind that is obsolete. Unsoundness of mind is no longer regarded as in essence a disorder of the intellectual or cognitive faculties. The modern view is that it is something much more profoundly related to the whole organism - a morbid change in the emotional and instinctive activities, with or without intellectual derangement.

(MPA 1923: 212.)

48. One of the more elementary principles is expressio unius, exclusio alterius" i.e. a provision which expressly includes certain states of affairs implicitly excludes all others.

Instead, the MPA proposed that the jury should be asked simply to decide whether the prisoner was insane; and if so, whether the prosecution had proved "that his crime was unrelated to his mental disorder?" This was not a novel proposal - the same test, differently worded, had been proposed by Isaac Ray in 1850⁴⁹ - but it was very different from the position the MPA had taken in 1896. After the highly publicized rebuffs they had suffered in cases like Perry and True, it is little wonder that the MPA was in a more militant mood, but its recommendations stood little chance of acceptance from a committee dominated by lawyers.

To the Atkin Committee, the MPA's argument seemed obviously fallacious. The law directed its attention to "the intellectual and cognitive faculties" not primarily for any obsolete medical reason, but because they were the matters relevant to mens rea. The Committee restated the Austinian justification for the McNaughtan Rules:

A crime no doubt implies an act of conscious volition; but if a person intends to do a criminal act, has the capacity to know what the act is, and to know the act is one he ought not to do, he commits a crime. Whether he should be punished for it is not necessarily the same question.... If the mental conditions we have presupposed exist, we think that punishment may be fairly inflicted. It is probable that the offender and others will be deterred. On the other hand, if the offender tends to escape punishment by reason of nicely balanced doubts upon a diagnosis of uncertain medical conditions, the observance of the law is gravely hindered.

(Committee on Insanity and Crime 1923: 7)

The Committee was, however, persuaded that a limited amendment of the law on the lines proposed by the BMA was desirable (in fact it went further than the BMA in one respect, since it did not adopt the exclusion of self-induced insanity from the defence). This would cover "mothers who have been seized with the impulse to cut the throats of or otherwise destroy their children to whom they are normally devoted," who were in practice found to be guilty but insane, although they knew the nature and wrongness of their acts (p. 8). It recommended that a defendant should be found "not guilty on the ground that he was insane" (a form of words it consid-

49. "Insane persons shall not be made responsible for criminal acts in a criminal suit, unless such acts shall be proved not to have been the result, directly, nor indirectly, of insanity" (quoted by Hughes 1986: 68). Cf. the test recently proposed by the Law Commission (1989, clause 35(2); Mackay 1995: 135).

ered more logical than "guilty but insane") not only in the circumstances covered by McNaughtan but "when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist" (recommendations 1-3).

It was with a view to "alleviating any hardship that may be caused by the single punishment for murder" (p. 18) that the Committee recommended retaining the existing arrangements for respiting the death penalty. It recognized the possibility "that the degree of insanity contemplated by the exponents of the common law" rule that an insane person should not be hanged "was greater than that which would be covered in these days by a certificate of insanity", but was "not prepared to draw a line short of a certificate of insanity given after inquiry by reasonable and experienced medical men" (p. 19). Sir Herbert Stephen dissented on this point, arguing that the Home Secretary should have discretion to leave a person certified insane to execution.

The majority's view left it open to the charge of inconsistency which was forcefully levelled by Sullivan (1924: 244-5). If certifiable insanity was a good enough criterion for whether or not a murderer should be hanged, why was it not also a good enough test for responsibility? In principle the Committee's answer was clear: the McNaughtan Rules were concerned with whether the defendant could fairly be said to be guilty of a crime; "Whether he should be punished for it is not necessarily the same question." But while responsibility and punishment were separated in some areas, most notably by the Mental Deficiency Act 1913, such a separation was incompatible with the mandatory death sentence for murder. To have called this sentence into question, even had it appealed to any of the Committee, would have been far outside its terms of reference.

The Home Office's initial reaction to the report was to do nothing. Ten months after it was published an official opened a file on it with the words: "The Report was left unminuted for a time, partly in order to see how it was received, and partly because it was known that some of its recommendations would be embodied in a Bill to be introduced by Lord Darling".⁵⁰ Although Sir Ernley Blackwell and Sir Edward Troup had served on it, they let it be "understood

50. PRO HO 144/21740/1, minute dated 3 Sep. 1924.

that they do not associate themselves with the recommendations to the foot of the letter".⁵¹

Lord Darling, who as a judge had so energetically defended the McNaughtan Rules in Perry, Pank, Bartlett, Quarmby and other cases, seemed an unlikely sponsor for the Criminal Responsibility (Trials) Bill which sought to implement Atkin's recommendations on "irresistible impulse" and the wording of the special verdict. Darling's motives can only be guessed at;⁵² perhaps, as a newly-created peer of 75, he was glad of the opportunity to make his mark as a legislator. In a newspaper article published a month before the second reading Darling (1924) was at best lukewarm in his support for Atkin: Parliament should resolve the matter one way or the other, and a new rule would "allay the regrettable differences which have long existed between physicians and jurists." His speech introducing the Bill, however, was unequivocal enough. He asked his opponents

to state categorically whether [they] recognise that there is actually such a thing as uncontrolled impulse due to disease of the mind? If they say "No," then they are in direct conflict with practically all the medical opinions of the day. If they say "Yes," then ... why have the man condemned?... Why not find that he is not guilty because he cannot control himself, and send him to the proper place, the lunatic asylum?

(Hansard 15 May 1924, col. 453.)

Darling received no support from the Home Office or the Lord Chancellor's Department,⁵³ nor from any of the peers who spoke in the debate. Hewart, LCJ said that he had consulted 12 of the 15 King's Bench judges, of whom "ten are, like myself, emphatically opposed to this measure, one is emphatically in favour of it,⁵⁴ and one is doubtful" (col. 465). The Atkin Committee's proposals would give "formal correctness" to verdicts which were reached anyway in cases such as those of mothers who killed their children. But "What a door is being opened!" How were juries to decide whether an impulse was uncontrollable? Would they not be invited to

51. ibid., 9 Sept. 1924.

52. Graham's (1931: 191-2) account sheds no light on the matter and the more substantial biography by Walker-Smith (1938) ignores the Bill completely.

53. PRO HO 144/21740/8 (1924)

54. This was probably McCardie J, who supported the change in a speech at Cambridge University (McCardie 1924).

infer that it was from the very fact that it was uncontrolled? Hewart did not accept the argument

that as medical science grows, as knowledge increases, it is right that the criminal law should keep pace with it. What does that mean? Does it really mean that from time to time, as medical theory expands, the Rules of the criminal law are from time to time to be modified? Is it not far safer to say: Let medical science clothe ... with ever-increasing meaning the term insanity. Yet the law will still ask: Is this person to be excused because he did not know what he was doing or ... that he was doing wrong?

(col. 470)

R.B. Haldane, the Lord Chancellor in the Labour government, and in general a firm believer in the value of scientific expertise, added his weight to this argument:

I have given some attention to the subject of psychology. Any more vague science at the present time, any science in which vague terms can so easily be made to do duty for clear conceptions, I so not know. It is a most dangerous science to apply to practical affairs.... These scientists are excellent servants, but they are not always reliable masters.

(col. 473)

Lord Darling withdrew his Bill. As if to make quite sure the Atkin Report was safely buried, the Lord Chancellor and Home Secretary who had set up the committee now publicly condemned its main recommendation (Birkenhead 1924, Shortt 1924). Atkin himself (1926) stood his ground, but once Lord Darling's Bill had fallen Sir Ernley Blackwell's role as a signatory of the report did not prevent him from recommending his political masters to reject its other recommendations. The restoration of the "not guilty by reason of insanity" verdict in place of "guilty but insane" he dismissed as a piece of legal pedantry inserted by Sir Herbert Stephen. Blackwell also opposed the recommendation that it should be open to the defence or prosecution to request a medical examination by an independent consultant. Prison doctors and the D.P.P. could be trusted to ensure a proper diagnosis in any case of murder; and in other cases, "Apart from the great expense to the State of a large number of unnecessary examinations of sane and malingering prisoners we should not do anything to encourage the idea that criminality is largely a medical question of insanity." The Home Secretary agreed.⁵⁵

55. PRO: HO 144/21740/1, Minute dated 25 Sept. 1924.

The one aspect of the report which Blackwell and his Home Office colleagues did support "to the foot of the letter" was its "complete vindication" of their department's handling of reprieves on psychiatric grounds.⁵⁶ Blackwell thought it unnecessary to reply to a "silly letter" from the head of the Lord Chancellor's Department, Sir Claude Schuster, arguing that Atkin had been wrong to defend the status quo on capital sentences. "This seems to me", Schuster wrote, "to be shocking to the moral sense of the community, to be farcical in itself, and to make non-sense of the elaborate reasoning in the main body of the Report"; and he questioned whether "moral imbecility" ought "to justify the retention of True at the Community's expense for life"⁵⁷ - a view strongly endorsed by "some sections of the popular press" which, according to Partridge (1953: 269-71) kept up a "vendetta of hatred" against True until he died in Broadmoor in 1951.

McNaughtan Reaffirmed, 1925-39

In Kopsch (1925) the Court of Appeal definitively rejected what Hewart LCJ called "the fantastic theory of irresistible impulse". Despite this ruling, in Flavell (1926) Marshall Hall made a last, forlorn, attempt to persuade the Court of Criminal Appeal to implement Atkin's recommendation. With Hewart absent, the Court's judgment was expressed in much milder terms, expressing "no opinion in the desirability of altering the law, or whether it should be altered by legislation or by pronouncements of this Court", but declining to make a ruling which would be "contrary to a great number of cases which have been decided by this Court". Though it would have been possible, as the judgment in Flavell implied, for the Court of Criminal Appeal to depart from its earlier judgments upholding the McNaughtan Rules⁵⁸, there was no chance of its doing so as long as Lord Hewart was Chief Justice.⁵⁹ In Quarry (1925) Hewart, trying a supposed epileptic

56. Ibid., Minute dated 3 Sept. 1924.

57. Ibid., letter from Schuster dated 26 Nov. 1923, annotated by Blackwell.

58. See Power (1919) and Norman (1924) for examples of the Court's willingness at this period to depart from its previous decisions.

59. Gordon Hewart, Liberal MP for Leicester East 1913-22; Attorney General 1919-22; Lord Chief Justice 1922-40; regarded by "[l]ater generations of lawyers ... as 'a dreadfully bad judge'" (Abel-Smith and Stevens 1967: 129n.); "perhaps the worst Lord Chief Justice of England since the seventeenth century ... he rivalled [Scroggs and Jeffreys] in arbitrary and unjudicial behaviour" (Heuston 1964: 603-4).

who had beaten his "nagging" wife to death, told the jury:

There are few topics upon which so much rubbish and so much sentimental nonsense has been talked as upon the question of insanity....One may wonder, as I often wonder, how professional gentlemen of standing can bring themselves to give it as their opinion that a certain state of affairs existed, with the result that, if they succeed - and they sometimes do succeed - a man whom you and I know perfectly well to be sane is sent for an indefinite period to a criminal lunatic asylum. A terrible responsibility!... Can you imagine anything less merciful than to stigmatize as a criminal lunatic a man who is perfectly sane?

(Times 26 July 1935: 11. Quarry was later reprieved.)

Paradoxically, Hewart could claim both that to consign a sane man to an asylum was a fate worse than death and that it was "opening the door to crime", giving "carte blanche to the assassin" (Anderson, 1935). He was not alone in this⁶⁰ and strictly speaking the two views were not inconsistent; Broadmoor might have been less feared than death and yet worse in reality. But a leading psychiatrist's portrayal of Broadmoor as a place of "low-browed criminals, scowling and glaring in their dementia ... hideous shrieks, insane leers, brutal and savage violence" (Armstrong-Jones 1922) is not borne out by "Warmark" (1931), who having been found insane in 1923 on a charge of murdering his daughter, though by his own account he was little more than neurotic, found life in Broadmoor greatly preferable to the grim conditions of Brixton's medical wing. He describes an institution which for him was a welcome refuge, but in which few of the inmates he met seem to have been particularly mad, and in which little about the regime was therapeutic.

Another paradox in Hewart's position was his insistence both that juries must be "precise" in following the McNaughtan Rules (Anderson 1935), and that there was no need for reform because juries in practice found no difficulty in acquitting defendants who had a real mental disease and no sane motive for their crimes (Hewart 1927; see also Humphreys 1922). In the case of Lloyd (1927) he was able to take a remarkably broad view of what constituted insanity. Lloyd, who had shot and killed a policeman, had been pensioned off from the army with "shell-shock" in 1917, but all the medical witnesses at the trial were of the view that he was

60. Lord Sumner in the House of Lords' debate on Atkin (15 May 1924 cols. 443-76) and "Distinguished London Neurologist" (1922) provide equally striking examples.

neurasthenic rather than insane (Robinson 1947: 141). There was, however, evidence from neighbours that he was prone to "mad fits". The trial judge gave a hint - a very mild one by the standards of Hewart's summings-up - that the right verdict would be guilty but with a recommendation to mercy; and Hewart and his colleagues on the CCA substituted a special verdict on the ground that it was what the jury would have decided but for the judge's remarks. The court's willingness to ignore the medical evidence⁶¹ - no reference to which was made in the judgment - suggests that it was the medical expert rather than the "shell-shock" victim or popular sentimentality that was the real object of their hostility. Even Hewart, however, accepted that Stable J had gone too far in Dillon (1939) when he told the jury that what the defence expert called "affective epilepsy" was no more than "loss of temper".

The CCA's attitude reflected its concern at the frequency and success-rate of insanity pleas. Hewart described the insanity defence as an "almost invariable makeweight" in murder trials (Bouquet, 1936), and Avory J, in dismissing the appeal against Hewart CJ's flagrantly partisan direction to the jury in Anderson, declared that the Court "could not shut their eyes to the fact that the kind of defence which was raised in the present case" - that Anderson's "mind was a blank" - "had become almost common form in cases of crimes of violence."

Defences based on a "temporary disorder of consciousness" were, as Dr Sullivan of Broadmoor admitted, extremely difficult for medical witnesses to pronounce upon; "we have to be on our guard, not only against an excessive credulity, but also against an excessive scepticism" (1922: 151). But except in cases of infanticide (see Ch. 7) or post-epileptic automatism (Ch. 6), successful defences of this kind were few and far between. Penny (1923), Golding (1929) and Lockhart (1939) were all middle-class men who may have been better able than most to overcome medical and legal scepticism; both Penny and Golding gave evidence in their own defence, an unusual course where insanity was pleaded.

The strictest interpretation of the law by the CCA was not one of Hewart's judgments. Achew (1930) was one of the not uncommon cases where a man killed his common-law wife under the influence of obsessive, allegedly insane, jealousy. Talbot J, dismissing his appeal

61. In North (1937) the Court confirmed that expert evidence was not a prerequisite for an insanity defence; but there must be some substantial evidence or the judge was entitled to withdraw the defence from the jury.

against conviction "said that there was the sharpest difference between what medical men, and perhaps ordinary men, called insanity, and the legal definition....On the legal definition there was a definite ruling, which bound both the Judge at the trial and that Court". He proceeded to read out the judges' fourth answer in McNaughtan, which states that the guilt of a deluded defendant should be assessed as if his delusion were true, and pointed out that "assuming the dead woman to have done all that the appellant insanely believed her to have done ... that did not justify a husband, or any man, in putting an end to her life." Since the judges' answers were theoretically not in themselves a binding authority (see Ch. 6), Achew's case itself appears to be the only binding authority for this rule on delusions. This is not to say that it was ever generally followed, or even known (the only law report of the case is in The Times). In Robson (1931), McKinnon J expressed his agreement with a verdict of insanity based on a nurse's delusion that the patient she killed had defamed her; and in Dawson (1932) the judge directed the jury that it could find the accused insane if he had deludedly believed it was "justifiable and in that sense right" to shoot his brother, even though he probably knew it was against the law. Davis and Wilshire (1935) and Barnes (1943) in their otherwise thorough reviews of the state of the law, either wilfully or inadvertently ignored Achew;⁶² Barnes claimed that "the 'delusion test' is no longer accepted anywhere" (1943: 305). Achew himself, inevitably, was transferred to Broadmoor (Lang 1935: 130).

Aware that judicial and Home Office practice was less strict than the letter of the law, a section of medical opinion reverted to the view which had earlier had earlier been taken by Mercier. "The opinion of our most experienced prison medical officers", wrote East (1927: 71) "is that hardship has not resulted because in most cases the law is not strictly applied." Mercier's (1915) comment that he could not recall a case in thirty years where a prisoner had been convicted on evidence which would have justified a special verdict was as true as when it was made (East 1927: 74) - a surprising comment in view of East's experience in True and Iggulden. East's less conservative colleague Hamblin Smith agreed: "Although there were great theoretical objections to the M'Naghten criteria", he told the National Council for Mental Hygiene (1933: 1033),

62. So, later, did Williams (1961) and every other criminal law textbook I have consulted.

"they worked well in practice and involved no hardship to the accused person." And there were even greater theoretical objections to Atkin's proposals: it was impossible to give scientific meaning to the "self-control" test (Smith 1927: 143).

The McNaughtan test, on the other hand, was one which could be given "scientific meaning", albeit with difficulty. The special expertise of the "forensic psychiatrist" - or prison medical officer - lay partly in the ability to translate medical symptoms into legal terms. Norwood East's Introduction to Forensic Psychiatry - the earliest textbook to define the specialism in this way - carefully related the legal tests to various medical diagnoses. For example:

The accused, in early stages of dementia præcox, may be responsible at law for his crime. He may know what he is doing; that is, the nature and quality of his act, in comparatively late cases. The ability to know what he is doing is wrong will be found usually to be lost first...[E]ach case requires individual consideration of the evidential circumstances, as well as the psychological material.

(East 1927: 178)

The last important attempt before the war to reform the McNaughtan Rules came with the hearings of the parliamentary Select Committee on Capital Punishment in 1929-31. The Committee heard evidence, on the one hand, that the special verdict was widely used to evade the mandatory death penalty for murder, and on the other, that many "abnormal" murderers were still being hanged. Its report (signed only by the Labour members, the Conservative minority having walked out) recommend that the death penalty be abrogated for an experimental period of five years, but that if it were retained, the definition of insanity should be reviewed. The Labour government fell shortly after the report was published, leaving its recommendations with little chance of implementation (Christoph 1962: 20). In 1938, however, a motion expressing support for a five-year experimental abolition of the death penalty was passed after a debate in which one of the issues raised was the reluctance of juries to convict and their willingness to return insanity verdicts on perfectly sane murderers.⁶³ The experimental abolition proposal was revived after the war, and after a long political struggle (Christoph 1962, Ryan 1983) was enacted in 1964.

63. Hansard 16 Nov. 1938, cols, 954-1,1010, esp. 958-9.

Conclusion

Despite its division over the issue of irresistible impulse, legal opinion was united on one fundamental point: the boundary between the criminally responsible and the insane should be drawn in a way which reflected the internal logic of legal discourse, not that of medicine. The perception of the need to maintain this legal definition was reinforced (as we shall see again in the next chapter when we turn to the academic jurisprudence of the period) by the divided and uncertain state of medical knowledge. The divisions within medicine were partly a result of internal developments such as the growth of psychoanalysis, but were also produced in part by legal procedures which increasingly pitted the prison doctor against the lunacy specialist.

Medical opinion was divided as to whether to press for a modest relaxation of the legal definition of insanity or whether to bring the legal definition as far as possible into line with the medical one. Neither strategy succeeded in changing the law, but in practice it was the medical and not the legal definition of insanity which determined whether a murderer was to be hanged, sent to Broadmoor or (in borderline cases) imprisoned. From the medical point of view this was not altogether an unsatisfactory position, least of all from the viewpoint of such senior medical servants of the state as W. Norwood East, whose powers over life and death as a member of virtually every medical inquiry on a condemned prisoner in the 1930s exceeded those of any judge (Sargant 1967, Bowden 1991). The senior judiciary, on the other hand, increasingly resembled King Canute in their ill-tempered decrees that the rising tide of psychiatry must not encroach upon the legal realm.

CHAPTER 6

OTHER LEGAL ISSUES, 1908-39

The combination of rigidity in theory and flexibility in practice which characterized the legal and administrative approach to capital cases where insanity was pleaded was also in evidence in other related areas of the law. The determination of the judges to define insanity in purely legal terms was echoed in the writings of academic jurists who restated the Austinian approach which we examined in Chapter 2. If, however, the scope of exclusion from criminal responsibility was defined on purely legal grounds (inability to understand the trial, lack of mens rea or inability to subsume one's actions under legal rules), it would not only exclude many of the medically insane but also include a potentially large category of the medically sane: defendants who could not understand the trial through deafness or lack of education, who lacked mens rea or an understanding of the wrongness of their acts because they were extremely drunk, or whose harmful bodily movements were the product of physical rather than mental disease or occurred during sleep. While Austinian jurisprudence could provide a fairly coherent justification for holding some medically insane people responsible, the courts' attempts to define the boundaries of unfitness to plead and those between insanity, automatism and drunkenness appeared arbitrary and riven with contradictions - a characteristic which has become even more apparent in the post-war period.

The final section of this chapter turns from the Assizes to the magistrates' courts¹ where a very different approach to criminal responsibility prevailed. Here the use of broad discretionary powers rendered the niceties of the M'Naughtan Rules irrelevant, and reform-minded magistrates worked with doctors and psychologists to lay the foundations of a welfarist approach which was to flourish in the post-war years.

Jurisprudence

The period covered by this chapter immediately followed the "classical" period of legal scholar-

1. A complete survey of legal practice would have to include the occasional use of insanity defences and unfitness to plead at the Quarter Sessions, which tried cases of intermediate seriousness. To assemble a reasonable sample of such cases would require considerable further research.

ship and education, which Sugarman (1991) dates as lasting from c. 1850 to 1907. Virtually all the judges and legal writers of our period were therefore products of classical legal training, and the assumptions of that approach continued to shape their thought.

In the classical period, according to Sugarman, the first generation of full-time law teachers established the legitimacy of law teaching as a profession by declaring law to be a science. The task of legal science was to gather together the chaotic data of legal precedent and practice and to tease out the underlying principles which, supposedly, showed it to comprise a coherent whole. The theoretical foundation for this approach was provided by Austin, ignored in his lifetime but now raised to the status of "a religion" (W.W. Buckland, quoted *ibid.*). Like most religions, Austinianism departed in some respects from the spirit of its founder. For Austin, the task of legal science had been one of sweeping rationalisation and codification. For later Austinians, the task was to discover an order that was already there, the ancient wisdom of "our lady of the common law".

The McNaughtan rules lent themselves perfectly to this kind of scholarship. Though the right-wrong test was of great antiquity (Crotty 1924, Sayre 1932) it could be explained, as Austin and the Criminal Law Commission had shown, as flowing logically from the fundamental principle that the object of criminal law was to regulate conduct by the threat of sanctions. As G. Aikenhead Stroud put it, in a work which restated the law of *mens rea* on Austinian lines, "All the useful results of ancient learning [were] gathered together" in the McNaughtan Rules, which reflected "the unchangeable principles upon which criminal law is based"; and "the idea that [the insane] should be acquitted of their crimes by reason of their mere insanity, apart from any question of the effect thereof upon their capacity to understand and obey the law, is a gospel of absurdity" (Stroud 1914: 73, 68, 69).

There was, however, one major difficulty with the "black-letter" approach to insanity. According to the strict rules of precedent which had emerged towards the end of the nineteenth century (Evans 1987), the judges' opinion in the McNaughtan case could not in itself be consid-

ered authoritative.² Its authority derived from "being made the ratio decidendi of every judgment delivered since 1843" (Oppenheimer 1909: 24; see also Stroud 1914: 73). But these judgments - or rather summings-up at trials - differed quite considerably in the degree of latitude they allowed to the insanity defence (see above: 68-75). Kenny (1902), in his standard textbook on criminal law, was willing to accept that the law had become more flexible in practice than the letter of the Rules suggested (see also Vinogradoff 1920). Oppenheimer (1909) and Stroud (1914) used a selective approach to precedent to preserve the purity of the central part of the M'Naughtan rules - the "nature and quality of the act" and "knowledge of (legal) wrong" tests.³ According to Stroud (1914: 66) "even the most recent judicial pronouncements cannot without large reservations be accepted as defining the law, consisting as they do for the most part of directions to juries.... Moreover, there are always two ways of stating the same truth, the one tending to conviction, the other recommending an acquittal." But such an acknowledgement of the discretionary power of judges and the selective nature of textbook-writing called into question the very assumptions of legal certainty and academic objectivity on which the black-letter approach rested. The judicial and extra-judicial pronouncements of Stephen J - who belonged to the "classical" era chronologically but not intellectually - were a particular embarrassment, and came in for stern criticism: "The dictum of Stephen, J., in R. v. Davis [1881] is not good law, and his definition of sanity is not good sense" (Stroud 1914: 82). "It seems incomprehensible that the manifest absurdity of such a view of the law should have escaped a mind as lucid and penetrating as that of Mr Justice Stephen" (Oppenheimer 1909: 34).

If law was to be a science, should it not take account of the findings of its sister-science, medicine? To Sir Paul Vinogradoff (1920: 34), the eminent legal historian, it seemed "obvious that the point of departure for any discussion of mens rea must be sought in psychology". Heinrich Oppenheimer, whose book, like Stroud's, was originally a University of London LL.D. the-

2. An indication of the greater clarity ascribed to the law of precedent is that Stephen (1883, II: 154) thought the authority of the answers merely "questionable", a view which Stroud (1914: 72) found puzzling as it was self-evident to him that the answers had no "inherent authority".

3. Stroud was, however, prepared to jettison some of the details of the M'Naughtan opinion - such as the rule that deluded defendants should be judged as if their delusions were true - as having been based on erroneous medical evidence.

sis, took a much more sceptical view. As a doctor of medicine as well as law he was well equipped to expose the limitations of contemporary psychiatry:

what are ... called [mental] diseases are by no means well-defined, ultimate pathological entities, but merely collections of symptoms classed, for the sake of convenience, under heads and sub-heads in a somewhat arbitrary fashion ... [T]he conception of insanity as a cerebral disease, though it has much to recommend it, remains still a mere hypothesis.

(Oppenheimer 1909: 105, 107.)

But how could a medically untrained lawyer distinguish fact from hypothesis in the psychiatric literature, with its "vast tracts of terra incognita filled with theories" (*ibid*: iii-iv)? Even Stephen (1883), after all his researches, had ended up (Oppenheimer rather unfairly alleged) uncritically accepting every word of Maudsley's. To accept the notion that the law must keep pace with science would simply place the law at the mercy of fashion: "Shall every will-of-the-wisp which, for a time, turns medical science from the path of truth and progress, be faithfully reflected in the mirror of criminal justice?" (*ibid*: 111). *And even if the science was impeccable, there was a more fundamental problem: the law dealt in either/or judgments, while in science everything was a question of degree:*

in the same way that no chemist would think of asserting that a given solution is free of prussic acid when his tests reveal merely the faintest traces of the substance, so any deviation, however trivial, from the ideal of mental equilibrium must of necessity strike as morbid the medical observer nurtured at the bosom of natural science ... [whereas] in law, where everything must become the subject of fixed rules, the need for a clear and precise criterion enabling us with some certainty to shift the wheat from the chaff must be apparent.

(*ibid*: 108-9).

As Horwitz (1992: 17) has written in the American context, classical legal thought was "dominated by categorical thinking - by clear, distinct, bright-line classifications of legal phenomena", in contrast to a view which sees such phenomena in terms of continua and flexible standards. Both in this respect and in his scepticism about medical science - which reflected a more

general disillusionment in the Edwardian era with the simplistic scientism of the Victorians⁴ - Oppenheimer's position was close to the orthodox judicial view which was to prevail in the debates over the Atkin Report

Whilst Oppenheimer explicitly stood on the "solid ground of the classical school" of penology, basing punishment on guilt, not dangerousness (1909: 96), his position did not depend on any metaphysical doctrine of free will: "the question of free will is really altogether foreign to the problem of the state punishment of crime, and it has been owing to a confusion of legal and moral responsibility that it has been imported into a discussion of the subject" (1913: 275). Similarly Kenny's text-book on criminal law criticized that "very important school of jurists - the 'Italian' or 'Positive' school of criminologists" not primarily for its rejection of free will⁵ but for its neglect of deterrence:

Instead of treating nearly every offender as a responsible being, capable of being deterred from crime by the threat of punishment, these writers, all but discarding the idea of deterrence, treat nearly every grave offender as an irresponsible being, the victim of either his nature or his nurture

(Kenny 1929: 519)

In standard Benthamite fashion, Kenny treated economical deterrence as the rationale for the insanity defence (1902: 51-9; 1929: 52-3) .

Kenny and Oppenheimer both retained the Victorian idea that the criminal law had an important educative or character-building function. "To elevate the moral standard of the less orderly classes of the community", wrote Kenny (1929: 27) "is undoubtedly one of the functions of the criminal law". As Oppenheimer argued (in part paraphrasing the philosopher Hastings Rashdall):

Upon the lower strata of society, into the dark recesses of which the ethical spirit

4. See Hynes (1991 [1968]: 132-4); J. Rose (1986).

5. In an essay written to mark the death of Lombroso, the leader of the Italian school, in 1909, Kenny (1948: 6) did briefly touch on the free-will issue, arguing that no "theory" could refute the "universal consciousness of personal choice in our actions".

of the age penetrates with difficulty, the operation of the criminal law as an engine of moral discipline is [particularly] direct; there are probably thousands, as Mr Rashdall remarks, who have scarcely any moral notions except those rudimentary ideas of right and wrong which are inculcated at assizes and petty sessions.

(1913: 294)

It was on these grounds that Oppenheimer attacked the views of those like Lombroso and F.J. Smith, a reactionary authority on forensic medicine, who argued that criminal lunatics should be put to death, not as a punishment but for the protection of the public.⁶ What all such arguments overlooked, according to Oppenheimer (1909: 95), was the importance of "the moral reprobation which the more serious offences call forth on all sides". But although in this respect his position was close to Stephen's, he did not draw from it (or even appear to understand) Stephen's conclusion that the definition of insanity should be extended to reflect positive morality. To temper the law with mercy was the role of the sovereign under the prerogative of mercy (*ibid.* 246); and "To secure that the prerogative shall be exercised, not in a capricious manner but according to settled principles of experience and propriety, is the business not of law but of public opinion" (Stroud 1914: 84).

The work of Kenny and Stroud was important in laying the foundations for the academic study of criminal law on Austinian lines.⁷ There is little evidence that it directly influenced the judiciary; rather, academics and judges shared a common frame of mind which has been well described by Atiyah and Summers (1987: 38):

English judges have throughout history shown anxiety lest the effect of legal prohibitions should be weakened by equitable modifications designed to show mercy or compassion (or even justice) to those who committed prohibited acts in exceptional situations of stress or ignorance or lack of cognitive understanding. This elitism betrays a lack of trust in the public itself, and often also of the jury....

6. As Smith (1900: 249) admitted, his view was at odds with that of most of the medical profession, but it was popular with "those who look upon themselves as specially strong-minded" (Nicolson 1913: 641), including the novelists Ouida (1893) and H.G. Wells (*Anticipations*, 1901, quoted by Carey 1992: 125); the playwrights St. John Hankin (1893) and - with some equivocation - Bernard Shaw (1934: 136 [1905] and 295-301 [1922]); and the clergyman Dean Inge (1922, quoted by Potter 1993: 122). A particularly "strong-minded" view was that of the Marxist biologist Joseph Needham: "Scientifically speaking, there can be no such thing as personal responsibility, and all that can be done is to disembarass society from its undesirable elements by killing them off." (*The Great Amphibium*, 1931, quoted by Werskey 1988: 99.)

7. Cf. Stannard (1990) who rightly points to Austin's enduring influence on criminal law doctrine, but wrongly supposes that his work disappeared from view until it was rediscovered by J.W.C. Turner in the 1940s.

The public...must not be given grounds to believe that the law will take account of substantive reasons arising out of the particular circumstances of the case: formal rules ought to be observed by the populace without question, but the elite may sometimes stretch out the hand of mercy. This mercy will not lead to the incorporation of the substantive reasons in the rules themselves, but it may be available by way of discretion in sentencing, or by extensive use of the power of pardon, or in other ways.

Automatism

Stroud's concern to protect the law from the gullibility of juries can be seen in a passage where he recognizes the theoretical possibility of a defence of automatism independent of the insanity defence,⁸ but immediately qualifies his argument with the remark that "the integrity of judges may be relied upon to protect juries from a too ready acceptance of the fanciful theories now in vogue". He was referring to the case of Chetwynd (1912), one of the first attempts to establish a defence of sane automatism in an English court.⁹

The defendant, an engineer, was charged with stealing a motor-car. Dr T.B Hyslop, a distinguished alienist who testified for the defence, considered that he had been in a state of "mental automatism, which was midway between somnambulism and a minor form of epilepsy. In that state the person affected could perform complicated mental and physical actions of which he would have no recollection on recovering. He did not suggest that the accused was insane." At this time states of "fugue" or "double consciousness", were the subject of much medical debate, especially in France and the United States.¹⁰ Even the judge, Scrutton J, had heard of "a case in America" - doubtless Morton Prince's celebrated patient Sally Beauchamp (Ellenberger 1994: 140) - "where a girl changed every two or three years. Sometimes she was a good girl and sometimes she was a bad girl, and the good girl never had any recollection of what the bad girl had none. (Laughter.)" In cross-examination, Hyslop admitted that Chetwynd's "abnormal, irre-

8. Stroud's treatment of automatism as a form of compulsion, i.e. a situation in which a person's bodily movements do not constitute voluntary actions, accords with the current understanding of this defence.

9. There were a few nineteenth-century cases where it was pleaded that the defendant was asleep, only one of which resulted in acquittal (see below).

10. See Munsterberg et al. (1909) for a contemporary symposium on the problem, including contributions from the leading French and American experts, Pierre Janet and Morton Prince. The debate is brilliantly dissected by Hacking (1995).

sponsible self" might have known what it was doing, even if his "normal self" did not. In the dock, Scrutton J pointed out to the jury,

was a body and in that body was a brain which, in some mysterious way, controlled the action of the body, and which possessed a power, by some means still undiscovered by science, of determining right from wrong. That body, brain and judgment bore the label Chetwynd.... They had been told that upon June 2 the controlling power of that body's brain went to sleep and that it woke up again in July, and that in the meantime the body was not responsible for what it did. He had an uncomfortable feeling that if that body had not been so well dressed ... the jury would have thought little of [such a defence]. So far as he knew this was the first occasion when the question of double consciousness had been raised in the courts. They were dangerous things, these double personalities....¹¹

By seizing on the dual personality point Scrutton J had changed the issue from one of automatism to a rather different issue about the nature of personal identity, with which a number of American courts have had to grapple in recent years as diagnoses of multiple personality have once again become fashionable (Slovenko 1995: 72-85).¹² The judge's view on the issue was clear: "Jekyll would be hanged for Hyde's crimes", and Chetwynd would serve four months in prison.

A somewhat similar defence was put forward in Lockhart (1939) where a doctor killed his wife while allegedly in a state of "dissociated personality". Lord Dawson of Penn, the President of the BMA, asserted that Lockhart had acted "unconsciously" and "unknowingly", and defence counsel suggested to the jury that *"it was not the doctor's personality that was acting. It was a second personality of a nature that would do this act."* The prosecution's medical witnesses stated that Lockwood was suffering from a disease of the mind and would not have known what he was doing was wrong. He was found guilty but insane after the judge remarked that it would be "dangerous" to acquit him.

11. This quotation combines elements of the Times report (4 Nov. 1912) and that in the Derby Daily Express, quoted in the Journal of Mental Science, 60: 108.

12. I can find only one other case of double personality as a defence, "M." (1929), a schoolboy tried for theft at Oxford Magistrates' Court. Although not put forward with multiple personality in mind, Oppenheimer's (1909) argument that a person who does not know his identity does not know the nature and quality of his acts and is therefore insane would cover such cases.

In Sterry (1925), a defence of automatism was advanced on behalf of an epileptic who claimed to have had no consciousness of committing the offence of unlawful carnal knowledge of a girl of eight - a suggestion dismissed as "extremely improbable" by the sole medical witness, Maurice Hamblin Smith. Defence counsel did not ask for a verdict of "guilty but insane", but argued that as there was no voluntary act, Sterry was entitled to an acquittal. The Commissioner of Assize, Mr Vachell, rejected this argument and held that if Sterry had committed the offence in an epileptic state he must be detained as a criminal lunatic. "With this position", comments the Journal of Mental Science report, "we think all our readers will agree." Sterry was convicted and gaoled for 15 months.

Although "automatism" was a recognized medical term to describe states of impaired consciousness in epilepsy, the idea that it did not constitute insanity was a novel and startling one in 1925. As we saw in Chapter 3, the successful insanity defences of the late Victorian period had helped to forge a close connection between epilepsy, madness and violent crime. W.C. Sullivan made some attempt to counter the "unfounded" association of epilepsy with "serious criminal conduct", yet even he announced that "homicide is par excellence the crime of the epileptic" (1924: 132, 133), without considering that the number of institutionalized epileptic homicides might reflect the selective use of the insanity defence (cf. Grierson 1936). Homicide might occur in any of the "periodic mental disorders of epilepsy", such as "post-epileptic dream-states or maniacal outbursts", or might result from "the morbid epileptic temper", or from homicidal impulse, or the insanity or moral imbecility which was often associated with epilepsy (Sullivan 1924: Ch. 9). There was no suggestion that any of these were anything other than diseases of the mind (see also Smith 1922: 144-5; East 1926; Grant and Allen 1929).

Even if epilepsy was regarded as a disease of the mind, it gave rise to a legal conundrum which was raised by defence counsel in Edwards (1937). Edwards' defence had been that he cut his fiancée's throat during an epileptic seizure. At the appeal, counsel argued that although the jury had been correctly directed as to the definition of insanity, they should also "have been told that, if they were left in doubt whether the attack was committed during an epileptic seizure, they could not return a verdict of murder, because the requisite intention on the part of the appellant would not have been proved." Counsel's main submission appears to have been that this should

have led to a conviction for manslaughter, rather than an outright acquittal.¹³ The argument exposed the illogical position created by the House of Lords' clarification of the burdens of proof in criminal trials in Woolmington v. DPP (1935). The prosecution had to prove beyond reasonable doubt that the defendant had the intent required for conviction, yet where intent was negated by insanity the onus of proof lay on the defence. If the defence managed to cast doubt on the accused's mens rea yet failed to prove that its absence resulted from disease of the mind, an impasse would be reached in which neither a conviction nor a special verdict could be justified - but where an acquittal would be considered intolerable on policy grounds. Hewart CJ rejected the argument, and the suggested compromise of a manslaughter conviction, in characteristically impatient fashion:

it was suggested that, although and inchoate defence of insanity failed, it might, nevertheless, leave the minds of the jury in a state of uncertainty, so that they could find a verdict either of Not Guilty or of Guilty of manslaughter. Those propositions were not the law. The Judge ... would have failed in his duty if he had coquetted with or connived at the kind of suggestion which had been forward.

There was nothing in the appeal, and it must be dismissed.

A condition which could not easily be assimilated to insanity was sleep. Cases in which a movement of the sleeping body caused injury or death attracted no criminal liability (Byron, 1863) except under the Children Act 1908, s.13 which deemed that any infant's death from suffocation while sharing a bed with a drunken adult was the result of neglect.¹⁴ In Tolson (1889 at 187) Stephen J referred hypothetically to sleepwalking as a condition in which the defendant would be entitled to an acquittal by reason of lack of mens rea. In his theoretical discussion of automatism, Stroud remarked that sleepwalking, if it could be proved, was "obviously as good an excuse for an alleged crime as any that could be thought of" (1914: 193). Hewart LCJ stated

13. The argument for an outright acquittal on grounds of automatism in such circumstances was rejected by the House of Lords in the well-known case of Bratty v. Attorney-General of Northern Ireland (1961). The principle that mental disorder short of insanity may suffice to negate specific intent and reduce murder to manslaughter has been accepted in a series of Canadian cases, which were recently followed by the High Court of Australia in Hawkins v The Queen (1994); see Jones (1995: 488 n. 73).

14. "Overlaying" was a common cause of infant death at the time, though many cases attributed to it may have been what are now called "cot deaths" (Wohl 1983: 34).

in 1922 that "If a man walking in his sleep do something, it is not his act at all" (quoted by Kenny 1929: 40). But actual cases are hard to find.

In Alexander (1929) a woman who was subject to somnambulism cut her child's throat. The prison medical officer testified that "A woman walking in her sleep would not have her mind consciously functioning; she would not know the 'nature and quality of her act' or its 'wrongness'; but her mental state would not amount to insanity in the medical sense". Alexander was found guilty but insane, though whether on the basis of the sleepwalking theory or other evidence of her "acute mental distress" is unclear.

At Bristol Assizes in 1936 Albert Stone put forward a defence of sleepwalking to what appears to have been a charge of indecent assault - The Times was reticent about the precise allegation. Charles J directed the jury to acquit at the close of the prosecution case, on the ground that "there was very little evidence of any serious misbehaviour". The judge appears to have accepted the sleepwalking theory, since he rather unhelpfully advised Stone to "stay awake all night if possible". There was also some evidence of somnambulism in the case of Stockwell (1927), who killed his wife while in bed with her and attempted suicide on realising what he had done; but he was diagnosed as suffering from manic depressive insanity, and was found guilty but insane.

A number of other circumstances in which a person might lack mens rea without being medically insane were discussed in the medico-legal literature, including chorea (Mercier 1910, Stroud 1914), infection or high blood pressure (Davis and Wilshire 1935: 119-21), and hypnotism (Innes 1890, Lancet 1908, Kenny 1929) but none of these conditions ever seems to have come before the courts. Arteriosclerosis and cerebral tumours, which were later to figure in the leading cases of Kemp (1956) and Charlson (1959), were discussed in an important study of U.S. law by Glueck (1925: 349-51). Glueck could cite no reported cases on their legal implications, but treated them as members of a category of mental disease ("encephalopsychoses") covered by the insanity defence.

In early discussions of automatism the main emphasis was on the lack of mens rea rather than the absence of a voluntary act (Jones 1995: 497). As Ashworth (1995: 96) points out, it was largely in strict liability motoring offences, where intent did not have to be proved, that the dis-

inction between these two formulations of the defence later became important. In the pre-war period, most of the conditions in which unconscious or involuntary or unconscious acts were likely to occur were generally regarded as diseases of the mind; even in the sleepwalking cases, the courts managed to find sufficient evidence of insanity (or in Stone's case insufficient evidence of any crime) to avoid creating a clear-cut precedent for a non-insane automatism defence.

Intoxication and insanity

Chetwynd and Alexander foreshadowed a phenomenon which has become much more significant since the 1950s: the categorising as "diseases of the mind" for legal purposes of conditions which are not so defined by the medical witnesses. In the case of drunkenness exactly the opposite occurred: the law sought to draw a clear line between ordinary intoxication and insanity, although some medical experts questioned whether any such distinction was valid.

The relationship between intoxication and insanity raised two issues: was insanity produced by drink to be treated in the same way as other forms of insanity, and what difference was there between insanity resulting from drink and ordinary intoxication? On the first question there were conflicting authorities in the nineteenth century (Singh 1933). The cases of Meakin (1836) and M'Gowan (1878) indicated that temporary insanity produced by drink was not an excuse; but as we saw in Chapter 3, Stephen J in Davis (1881) accepted delirium tremens as constituting insanity (despite his theoretical views on self-induced diseases of the mind), and so did Day J in Baines (1888) - where the defendant was nevertheless convicted on the basis that delusional jealousy did not satisfy the M'Naughtan rules. By the turn of the century some judges were quite readily accepting delusional jealousy induced by alcohol as a defence (Flower, 1899; Watts, 1900). The Court of Criminal Appeal in Mead (1909) and the House of Lords in DPP v. Beard (1920) confirmed that, as Birkenhead LC put it "The law takes no note of the cause of the insanity" (Beard [1920] AC at 500).

In Mead (1909) the CCA approved the principle established in Monkhouse (1849) and Doherty (1887) that drunkenness not amounting to insanity would reduce murder to manslaughter if it rendered the defendant incapable of forming an intent to do grievous bodily harm. In Beard the House of Lords stressed that this defence must not be confused with that of insanity,

and criticized the trial judge for directing the jury to consider in connection with the manslaughter plea whether Beard knew that what he was doing was wrong. Beard had suffocated a young girl in the process or raping her; under the law at that time, all that needed to be proved to convict him of murder was that he intended to commit the rape.

This seemingly straightforward distinction between insanity and ordinary drunkenness ran counter to a body of medical opinion which asserted that drunkenness in itself was a form of temporary insanity. Davis and Wilshire (1935: 64) cited several leading medical writers to this effect,¹⁵ and treated the distinction between drunkenness and insanity caused by drunkenness as a curious quirk of "the legal mind". The Lord Chancellor in Beard, they complained, "did not recognize the possibility that drunkenness and insanity might virtually coincide in onset and duration, and that acute drunkenness is acute insanity!" This was a separate argument from the long-running debate within medicine over whether "alcoholism" or "dipsomania" (the "irresistible impulse" to drink) constituted a mental disease (McCandless 1984). Although some medical writers argued for the inclusion of either acute or habitual drunkenness within the scope of the insanity defence (BMJ 1892; Smith 1898; Shaw 1904; Sutherland 1907; Davis & Wilshire 1935), such a plea never appears to have been advanced in court. There were, however, certain borderline conditions which caused a degree of medico-legal perplexity.

One such condition was delirium tremens, which could constitute criminal insanity (Davis, 1881; Base, 1888) but which according to Atkinson (1907) was not usually regarded as insanity for the purposes of detention under the Lunacy Acts. It was, as the Lancet (1938) put it, "a legal and administrative crux" whether patients who were sane when sober but dangerous when drunk could be subject to prolonged detention as criminal lunatics. In dealing with less serious offenders, the more flexible powers of the magistrates afforded one solution: "it would be wise for medical men to label cases of delirium tremens exhibiting great violence during the mental deviation as mania a potu, even when such patients recover within the statutory fortnight during which temporary lunatics may be detained under the poor law."¹⁶ (Atkinson 1907: 115.)

15. See also Toogood 1906; Sutherland, 1907-8; Sullivan 1924

16. i.e. detained in a workhouse under Lunacy Act 1890, s. 21. See above, Ch.3, and section on magistrates below.

Mania a potu, or pathological drunkenness, was a term which could be used somewhat loosely but in its strict sense it referred to a condition in which the patient showed an extreme reaction to a relatively small amount of drink. This was occasionally raised as a defence in criminal trials, where judges stressed the need to distinguish it from mere drunkenness (Mountain, 1888 Kershaw, 1899; Parkes 1925). One such case which reached the CCA was Smith (1938) which raised the same problem about conflicting standards of proof that we saw in Edwards (1937). Smith, the mate of a barge, was charged with murdering his skipper and the defence suggested that his condition of amnesia was consistent with mania a potu. The prosecution argued that "This was a very obscure matter, and the jury might think it was so obscure that but little reliance could be placed on such a theory". The jury convicted. The ground of appeal was that Singleton J "did not adequately explain the burden of proof on the matters which would differentiate murder from manslaughter" - i.e. that the prosecution had to prove an intent to do grievous bodily harm even if the defence failed to prove insanity. Hewart CJ dismissed the appeal in characteristically brusque fashion, claiming that the defence "did not even begin to prove" insanity. So far as appears from The Times' report he did not deal with the burden of proof point at all - though considering that the victim was shot three times at close range, he probably found the suggestion that Smith might not have intended grievous bodily harm unworthy of discussion.

Unfitness to Plead

The case of Governor of Stafford Prison, ex parte Emery (1909) was the clearest example in the period under discussion of the courts extending, rather than restricting, the definition of insanity for policy reasons. We saw in Chapter 3 that deaf-mutes were treated as unfit to plead on the Victorian courts, in the context of a medical as well as legal view of the uneducated deaf as imbeciles. The combination of compulsory education for deaf children (introduced by statute in 1893) and the more precise classification of mental deficiency had made this equation of deafness and imbecility untenable by the time Emery's case was heard. Emery was deaf, mute and illiterate, and a friend using sign language could not make him understand the charge against

him.¹⁷ Although the prison medical officer testified that he was not insane, the jury found that he was unfit to plead by reason of his inability to communicate and Chanell J ordered him to be detained under the Criminal Lunatics Act 1800, s.2. His counsel lodged a writ of habeas corpus on the ground that this section, which begins "If any person indicted for any offence shall be insane..." was clearly inappropriate to a person who was sane but deaf. Alverstone CJ commented that he would "be very sorry if we were compelled to adopt the argument that the finding here does not amount to a finding that the prisoner is not sane. It might work great injustice in many cases to put a prisoner against whom such a finding is recorded upon his trial ... or it might be the cause of much mischief if he were found not guilty and allowed to go free." ([1909] 2 KB at 84.) The Court held that since deaf-mutes had been dealt with as insane in Dyson (1831) Pritchard (1836) and Berry (1876), the word "insane" in the Statute should be read as including all those who were incapable of understanding the nature of the proceedings.

Emery's case was not unique; Smith (1916: 771) mentions two "exactly similar cases" in 1908 and 1914. Smith pointed out that if the legal definition of unfitness to plead "were applied strictly and literally" irrespective of medical insanity it would cover a great number of defendants:

For instance, take the right to object to (technically to "challenge") a juror. How many prisoners are even aware of their right in this respect? True it is that the Clerk of the Court repeats a formula which informs the prisoner of his right. But one may be permitted to wonder how many prisoners find this information intelligible. And again, it is a question as to how many prisoners are capable of making what may reasonably be called a "proper defence," or of cross-examining witnesses, or (if defended) of giving proper instructions for their defence. But it is clear that mere ignorance, or lack of education, or ordinary stupidity, will not be enough to justify a verdict of unfitness to plead.

(Smith 1916: 767)

The principle on which the unfitness finding was based, according to Reading LCJ in Lee Kun (1915) was that the accused had the right to be present at his trial, which meant "not merely

17. Emery's counsel, Bosanquet, mentions the last point in the discussion of Mercier (1909). Schools certified under the 1893 Act had to be educated by the "pure oral method" (Ewing and Ewing 1954, Chs. 3-4) and the use of sign was strongly discouraged, a policy which made learning extremely difficult for the prelingually deaf (Sacks 1989: 11-13).

that he must be capable of being physically present, but that he must be capable of understanding the proceedings". In practice, the courts operated a procedure which must have been unintelligible to many defendants, and distinguished arbitrarily between those who did not understand it.

Like the insanity defence, unfitness to plead was applied mainly to those accused of homicide or serious violence. From 1900-22, findings of unfitness were made in 9.27% of murder trials, 0.88% of other trials for violent offences and 0.14% of other trials on indictment (Committee on Insanity and Crime 1923, Appendix C). Murder trials were, of course, the only cases where the defence was likely to raise the issue of fitness to plead. Under prison Standing Order 302 (1900), the medical officer was required to notify the Clerk of Assize, through the governor, of any case where there was a doubt as to the accused's mental condition. The same standing order also stressed, however, that a prisoner should "be left to stand his trial, unless there are strong reasons to the contrary". In theory "all prisoners remanded or committed for trial, whether a report is asked for or no, have their mental state investigated", but attention was concentrated on those who had been remanded for reports or who were "charged with certain offences, which experience has shown to be associated with diseased mentality", such as homicide and sexual offences (Prison Commission Report for 1925: 33). Although it was possible for the prosecution or the judge to raise the issue of unfitness, in practice it was usually left to the defence to raise if they chose (Smith 1916: 771).

As we saw in Chapter 3, the "ultimate issue rule" in the law of evidence was difficult to apply consistently to unfitness to plead. If the judge wanted to focus on the legal rather than the medical test of insanity, he would want the medical witnesses to answer questions about the prisoner's ability to comprehend the proceedings, challenge jurors, etc., rather than about their medical condition; yet if the witnesses were asked such questions *directly it could be objected* that they were addressing the "ultimate issue" and usurping the function of the jury. "Some judges allow, and even ask, the medical witness ... to express his opinion as to the prisoner's ability to understand the proceedings, to make a defence, etc. Other judges appear to have ruled that these latter questions are for the jury alone, and that the medical witness must confine himself strictly to a description of the facts" (Smith 1916: 772). The nature of the evidence in most cases of unfitness is difficult to establish because of the brevity with which they were reported in

the press, but as Higson (1935: 822) pointed out, the lack of press interest reflected the fact that such findings were rarely contested (there were, of course, exceptions such as the Iggulden and Holt cases discussed in Chapter 5). Higson, a long-serving prison medical officer, found judges in the 1930s much less "exacting" in their interpretation of the law on medical evidence than they had been earlier in his career.

In some cases the finding of unfitness was contested not by the prosecution but by the prisoner. In the minor cause célèbre of Tebbit (1912) defence counsel cross-examined the medical witnesses and elicited the admission that apart from his delusion that he was being persecuted by the banker Leopold de Rothschild, whom he was charged with attempting to murder, the accused was "a sensible man ... intelligent and studious." After Tebbit was found fit to plead, his plea of guilty took his counsel "quite by surprise". Coleridge J told the prisoner that he "was not responsible for his actions, and therefore no moral blame could possibly attach to his conduct", but that he must be sentenced as if he were sane, to twenty years' imprisonment. That sentence, however, "was more or less a formality, because he was quite satisfied, and the prisoner might be satisfied, that that sentence would not be carried into effect", but that he would be transferred to Broadmoor.

An even more sensational case was that of Walter Prince (1934), who killed a woman he believed had given him a venereal disease. Despite his client's objections, defence counsel tried to establish that he was unfit to plead because he had a delusion that what he had done was right. Under cross-examination by the prosecution the medical witness who supported this view had to admit that Prince knew was facing a capital charge and was capable of understanding the proceedings. Prince was found fit to plead, pleaded not guilty, but then admitted in the witness box not only to the murder with which he was charged (and which he maintained was justifiable) but to a murder four years earlier for which another man had been convicted. He was sentenced to death but found insane by a medical inquiry. The Home Secretary told Parliament that his confession to the earlier murder had been false. (See Robinson 1947: 142-7.)

The BMA's Crime and Punishment Subcommittee, whose report (1915) formed the basis of the Association's evidence to the Atkin Committee, was strongly critical of the detention of those found unfit to plead, especially in the light of the CCA's ruling in Larkins (1911) that as

those found unfit had not been tried on indictment they could not appeal against the finding:

It is submitted that such treatment of persons who have not even been tried upon the facts alleged against them, and have no right of appeal ... is contrary to the spirit of English justice, which presumes innocence until guilt is proved. ... [I]n many cases insanity is aggravated, and recovery retarded if not entirely prevented, by the sense of injustice under which such persons labour.

(BMA 1915: 114-5)

The subcommittee considered the idea of a "trial upon the facts" for those who were unfit to plead, but found the idea of trying those who were not fit to be tried contradictory. The BMA instead recommended that a person found unfit should have the right to apply to a judge at any time for the issue of fitness to plead to be re-opened. The Atkin Committee ignored this recommendation, apparently on the ground that all those found unfit to plead who later regained fitness and were remitted to trial were in practice found guilty but insane.¹⁸ The Committee's only recommendation on the subject was that, "save in very clear cases", a person should not be found unfit to plead without the evidence of at least two doctors. The Home Office interpreted this as being purely "for the guidance of the courts" and took no action on it.¹⁹ Defendants found unfit to plead apparently continued to resent it (Higson 1935: 829). Ralph Partridge's account of Broadmoor in the early 1950's attributes most of the protests from patients to "these 'insane on arraignment' cases hugging their grievance" (1953: 217).

There was no legal requirement for any medical evidence at all in support of a finding of unfitness to plead, although Higson's (1935: 30) story of a burglar who secured such a finding simply by standing on his head in the dock may well be apocryphal. In Vent (1935), however, the CCA held that there had been "no sufficient reason" to empanel a jury to enquire whether Vent was fit to plead, even though the barrister appointed by the judge to explain the consequences of the plea of guilty he had entered to a charge of murder found it impossible to get any coherent statement from him. The medical officer had reported that Vent was fit to plead, and the judge had declined to appoint another doctor to examine him. Vent was subsequently found

18. One exception to this generalization was Jones (1934) where it was believed the prisoner's insanity was feigned.

19. PRO: HO144/21740/1, minute dated 3 Sept. 1924

insane by a medical enquiry and sent to Broadmoor.

Minor Offenders and Magistrates' Courts

"It is often forgotten that the rules of criminal responsibility apply not only to cases of murder, but to the vastly greater number of lesser offences" (Committee on Insanity and Crime 1923: 7). The Atkin Committee went on to argue that if the Medico-Psychological Association's recommendation were accepted, bringing nearly all certifiably insane offenders within the scope of the insanity defence, the "effect must be to transfer many inmates of prisons to criminal lunatic asylums and to bring within the portals of the latter many persons who are now, without any public disadvantage, placed in the care of their relatives" (*ibid*: 8). The Committee was apparently unaware that in the magistrates' courts which dealt with the great bulk of minor crime, something very close to the MPA's recommendations already prevailed. In theory, a formal defence of insanity could presumably have been put forward in a magistrates' court and decided in accordance with the M'Naughtan Rules.²⁰ Reading LCJ clearly assumed this when he said in *Codère* (1916) that there "may be minor cases before a court of summary jurisdiction" where it would be doubtful whether "wrong" in the rules should be treated as meaning "legally wrong".²¹ In practice, however, as Norwood East pointed out, "in the police court or petty sessions the standard of insanity accepted may fall short of legal insanity as strictly applied in penal law, and the court will usually exempt from punishment an accused person who is certifiable as insane" (1927: 27).

The usual way of dealing with such offenders, as described by East, remained as it had been in the 1900s (see above: 53-7). Those who could pay, or whose families could pay, for private treatment were usually either discharged or bound over. Paupers were sent to the Poor Law Institution (as the workhouse was renamed in 1913) and, if certified insane after a period of observation, transferred to an asylum (East 1927: 27).

The Mental Treatment Act 1930 made two minor changes to these provisions which

20. A recent judgment of the Divisional Court (*Horseferry Road Magistrates' Court, ex parte K*, 1996) gives what appear to be sound legal reasons for supposing that magistrates' courts have never lost the common-law power to acquit people on grounds of insanity. See also White (1991).

21. See above: 140, on Reading's unconvincing argument that in serious cases legal and moral wrong were indistinguishable.

reflected the aim of breaking the association of mental treatment with the poor law (Busfield 1986: 319-20): pauper lunatics became "rate-aided patients" (s. 20), and the power to commit persons suspected to be of unsound mind to the poor law institution was amended to allow them to be committed to a hospital approved by the local authority (s.19). The 1930 Act's main innovation (s.1) was the introduction of a procedure for voluntary admission to a mental hospital (as lunatic asylums were henceforth to be called).²² Some magistrates tried to take advantage of the new procedure by making it a condition of a probation order that the offender should enter an institution as a voluntary patient and remain there for a specified period. Although the Prison Commissioners welcomed this practice (Report for 1930: 45), a Home Office circular of 1934 disapproved of such conditions as being "inconsistent with the voluntary position in which the Mental Treatment Act places the applicant for mental treatment" (quoted by Departmental Committee 1936, para. 95).

A few magistrates' courts made extensive use of psychiatric reports. Before the Great War the London courts led the way in this respect.²³ After the war the Birmingham Justices, inspired in part by concern that "shell-shocked" offenders should receive proper treatment, established a scheme under which Maurice Hamblin Smith and W.A. Potts were appointed to examine defendants who were either remanded to the local prison, where Smith could examine them in a specially adapted wing, or were seen in a non-custodial setting by Potts.²⁴ The Juvenile Organizations Committee of the Board of Education, in a report published in 1920, used the Birmingham scheme as a model for a system under which every child brought before a juvenile court should be medically and psychologically examined (Bailey 1987: 31; Burt 1925: 261-2). The Home Office, in a 1921 Circular to magistrates and in the First Report of the Children's Branch (1923) encouraged the courts to make greater use of medical reports (*ibid.*).

The magistrates' use of such reports remained uneven. The Prison Commissioners'

22. While the term "lunatic" was abolished in almost all other contexts, s. 20(5) of the Act expressly retained the term "criminal lunatic", which remained in use until 1959.

23. See Prison Commission report for 1909-10, p. 31.

24. See Birmingham Justices (1921), and other contributions to the first issue of the *Howard Journal*; *Lancet* (1919b, c, 1920); Smith (1922a). Those seen in prison far outnumbered those seen on bail (Potts 1925: 676).

annual reports repeatedly complained about magistrates who, instead of remanding prisoners of "doubtful mentality" in custody, convicted them and asked the prison to provide a medical report which the court could refer to if the prisoner appeared before them again.²⁵ They also complained (Report for 1932: 49) about the lack of information provided by most magistrates' courts when they did remand a prisoner for medical reports. A Home Office Circular of 1934 requested magistrates and their clerks to provide information to prison medical officers on the life history and mental history of those remanded for reports, but the response from all but a few courts was disappointing (Prison Commission Reports for 1933: 33; 1935: 54).

The magistrates most likely to be sympathetic to a psychiatric or psychological approach were those who joined the *Magistrates' Association established in 1921*. In its early days this was a small, reform-minded body which "adopted and championed an entirely new image of the magistracy which was based upon scientific skill" (Vogler 1990: 80). The new breed of magistrate did not claim to compete with the accredited "scientific expert" who alone was competent to discern the "determining factors" in any individual case (Hall 1926: 13). The magistrate nevertheless had a distinctive role to play, and to establish it on a sound basis it was necessary to arrive at some "common ground of action" between the seemingly irreconcilable world-views of science and law (*ibid*: 14-5). Equipped with a working knowledge of psychology, and with the reports of experts on particular cases, the magistrate would be able to strike the proper balance between the claims of deterrence and reformation (*ibid*; Mullins 1933). In some respects the role these magistrates attempted to carve out for themselves was a mirror-image of that of the prison medical officer; each occupied a relatively lowly place within their respective professions, but each sought to develop a distinctive expertise by acting as mediators between medicine and law.

The leading exponent of this view where juveniles were concerned was Sir William Clarke Hall, a Metropolitan stipendiary magistrate who "incurred the ridicule of old-fashioned legal critics for the psychiatric 'circus' said to attend his court" (Lancet 1936). Members of the "circus" included several distinguished psychiatrists who volunteered their services through the People's League of Health; the psychologists Cyril Burt and F.C. Shrubbsall of the London

25. See the Reports for 1925-6 (p.32), 1927 (p. 32), 1930 (p. 42), 1932 (pp. 35-6), 1935 (commenting at p. 54 on the magistrates' reasons for this practice).

County Council; and the staff of the Tavistock Clinic (Hall 1926: 97-9). The Tavistock, one of the main centres for the "new psychology", opened a children's department in 1926 under W.A. Potts (Rose 1985: 198), and provided lectures for magistrates in the 1930s (Mullins 1949). At least two of Hall's colleagues on the London bench, Claud Mullins and John Watson, came to share his enthusiasm for the psychological approach to crime (Mullins 1948, 1949, Watson 1942). They met stiff opposition: within a year of his appointment in 1931 Mullins had an "unpleasant interview" with the Chief Metropolitan Magistrate, who "denounced Sir William Clarke Hall [who had died the previous year] as 'a dangerous man', and showed no sympathy with my efforts to see something of prison life and penal institutions" (diary entry quoted in Mullins 1948: 163). But Mullins' account of his cases from the 1930s in Psychology and Crime, first published in 1943, was in its fifth edition by 1949. In the post-war years, the psychological approach to summary justice was an idea whose time had come (Vogler 1990: 80-2).

The Institute for the Study and Treatment of Delinquency opened its London clinic in 1932, offering assessment and treatment on an outpatient basis for both juvenile and adult offenders. By the late 1930s it was receiving around 100 referrals a year from courts and probation officers, mostly in cases of theft and sexual offences (Glover 1944: 271-5). Those referred were examined by a psychiatric social worker, a medical psychologist, and educational psychologist and an organic physician" (*ibid*: 280). Apart from a handful who were found to be "normal", all were given a diagnosis, usually of "psychoneurosis" or some abnormality of "character" and most were recommended for some form of treatment, usually psychotherapy, which the clinic could provide on an out-patient basis as a condition of probation.

Probation orders coupled with out-patient treatment were not open to the same objection as those requiring the offender to enter hospital, but they depended on suitable facilities being available. The Departmental Committee on Persistent Offenders (1932, para. 17) noted that there were only a few hospitals or clinics throughout the country which provided appropriate facilities: "an adequate service of such clinics, and also child guidance clinics, might effect some reduction in the amount of certain forms of serious crime."

Child guidance clinics were a major area of expansion for psychological expertise (N. Rose 1985: 200-19). The first such clinic in England opened in 1927, and in the same year the

Child Guidance Council was set up with a prominent magistrate, Mrs St Loe Strachey, as President and the psychologist Cyril Burt as Chair of the Executive Committee. By 1943 there 55 Child Guidance Centres in England and Wales. They employed a variety of approaches, depending on whether psychiatry, psychoanalysis or psychology and social work had the upper hand in their organization (Burt 1944: 648-51).

There was inevitably some rivalry between these professions in the provision of services to magistrates. Sir Robert Armstrong-Jones, a leading anti-Freudian psychiatrist, urged the Magistrates' Association not to "give up the privileges of their position to the psychoanalyst" (BMJ 1938) and to obtain the evidence "of a medical man, not of a pure psychologist" (Magistrates' Association & BMA 1939). But F.J.O. Coddington, the Stipendiary Magistrate for Bradford, found that medical evidence was often unhelpfully preoccupied with the questions of certifiable insanity and physical fitness. "What he wanted was a medical examination interpreted from a common-sense point of view. Discussion from the psychological - not the psychoanalytical - point of view was a help. The psychiatrist[s]...special knowledge was not required in the case of the great majority of these petty delinquents." As an example of such "common-sense" psychology, he mentioned that most "petty" sexual offences were "due simply to loneliness and friendlessness or to an inferiority complex, not using the term in its ultra-psychological significance" (*ibid.*)

W. Norwood East used his Annual Reports as Medical Commissioner of Prisons to cast doubt on the new clinics' role, arguing that "facilities for observation and diagnosis in a prison hospital ward are likely to be more effective than an occasional visit to a clinic" (Report for 1933: 34), and that some offenders were exploiting gullible psychologists at outpatient clinics (Report for 1934: 59). He singled out the diagnosis of "inferiority complex" on a particular sex offender as an example (Report for 1935: 59).

The Criminal Justice Bill, 1938, proposed two new powers for the magistrates. The provision for a "reception order" admitting a defendant to a lunatic asylum did little more than put on a more formal basis the magistrates' existing power to dismiss the charge and deal with the defendant under the Lunacy Act 1890. The other new power was one to make a probation order with a condition of psychiatric treatment. The Bill was not proceeded with owing to the

outbreak of war, but both powers were enacted by the Criminal Justice Act 1948, and have survived to the present day.²⁶

26. See Walker and McCabe (1973: 63-5). The successors to these powers are Mental Health Act 1983, s. 37(3) (which also incorporates the power created by the Mental Deficiency Act 1913, s. 9), and Powers of Criminal Courts Act 1973, Sched. 1A.

CHAPTER 7

GENDER AND INFANTICIDE

Throughout the late nineteenth and early twentieth centuries, women who killed their babies were treated very differently from the general run of murderers. Their special status was given statutory recognition in the Infanticide Acts, 1922 and 1938. It is tempting to regard this differential treatment as a straightforward reflection of prevailing gender stereotypes. Women, and especially mothers, were seen as less rational and closer to "nature" than men (Smith 1981; Jordanova 1989), so it is not surprising that an interpretation of their acts as the products of biology rather than moral agency was accepted comparatively readily where mothers were concerned. Powerful though these biological stereotypes were, however, their relationship to explanations of infanticide was complex. As Brown (1990) has argued, assumptions about women's biological frailty and passivity alone could not explain women's crime; rather they created a space for socio-economic explanations. When this interplay between biological and socio-economic explanation is understood, it will become clear that the Infanticide Acts were far from being a simple reflection of medical discourse.

Biology, Economics and Women's Crime

Victorian medical textbooks confidently linked women's madness to disorders of the reproductive system and to the effects of puberty, pregnancy, childbearing and the menopause (Fee 1982: 141; Showalter 1987: 55; Digby 1989). The mental and emotional life of the healthy woman - her maternal tenderness, spiritual refinement and emotional instability - were equally dominated by her "uterine economy" (Shuttleworth 1992). The moral and legal responsibility of women during such biological crises as menstruation and the menopause was always open to question (Macnaughton Jones 1902).

Even a crime which had no obvious connection with motherhood or sexuality - shoplifting - could be linked to reproductive biology (Heidensohn 1985: 94). Though occasionally

diagnosed in men,¹ kleptomania was primarily a female condition (Mercier 1910: 873; Winslow 1912: 280-2; Moir 1940) and was linked to hysteria, pregnancy (Baker 1892: 727; Hollander 1922: 108), menstruation (Middleton 1934; Abelson 1989: 186), the menopause (Sullivan 1924: 179) and by psychoanalysts to sexual frustration and penis envy.² One notorious "kleptomaniac", Ellen Castle (whose trial in 1896 and subsequent release are discussed by Abelson 1989: 175-9), was the wife of a wealthy American businessman. Her thefts were attributed to a disease of the upper uterus.³ Since it was (and is) a diagnostic criterion of kleptomania that the articles stolen were worthless or easily affordable to the thief (Hollander 1922), it was easily denounced as a defence for the rich.⁴ Leading medical authorities such as J. Dixon Mann (1908: 369), Mercier (1910b) and East (1927: 304) were highly sceptical about kleptomania, and it appears to have been a relatively uncommon defence in England, where (at least before the opening of Selfridges in 1909) the design of shops made theft more difficult and less tempting for middle-class women than it was in American or French department stores.⁵

Whereas kleptomania had a mixed reception from judges,⁶ puerperal insanity won relatively easy acceptance in the courts from the 1820s onwards (Eigen 1995: 142, 147-9). To argue, as do Smith (1981, Ch. 7) and Day (1985), that this acceptance reflected the congruence of the diagnosis with prevailing stereotypes of women is not to deny that some women suffered severe mental disorder associated with childbirth (cf. Oppenheim 1991: 227). Clinical records suggest that puerperal insanity, especially mania, in the nineteenth century was more frequent and more

1. For examples of male kleptomaniacs see Collins (1895), White (1899). Male kleptomania was also linked to sexuality, being particularly associated with general paralysis of the insane (Baker 1892) and with adolescence (Miller 1935).

2. See Gibbens and Prince (1962: 68-75) for a review of the pre-war (mostly foreign) literature.

3. On the medically orthodox view that pathology of the uterus was a major cause of mental disturbance in women see Shortt (1986: 142-3).

4. Carpenter 1905: 32; Armstrong-Jones 1923; Lord Sumner Hansard May 14 1924 col. 461. For the current definition see DSM-IV, § 312.32 (American Psychiatric Association 1994) quoted by Slovenko (1995: 109).

5. "The bane of the American stores, the kleptomaniac, is scarcely known [in England]" (Dry Goods Economist (1892, USA), quoted by Abelson 1989: 277, n. 73). But cf. Lancaster (1995: 185).

6. "I have come across many judges...who are loth to recognise any form of kleptomania" (Winslow 1910: 230). But by 1936 Humphries J could not "conceive of anybody these days doubting that there is such a thing" (discussion of Weatherly 1936).

florid than its present-day equivalents (Loudon 1988, Rehman et al. 1990). Puerperal mania was characterised by "gibberish nonsense, immodest conduct and bad language ... shameless indecency ... noisy delirium and marked religious exaltation, with purposeless restlessness" (Jones 1902: 583). As Loudon points out, such behaviour

must be seen in the context of the widespread belief that civilization had led to a profound weakening of womanhood. Only "savage peoples" could drop their babies without effort or danger and go straight back to work with equanimity. "Civilized" women could not be expected to bear the stress of labour unaided, and postnatal morbidity was something to be expected....When such views were commonplace amongst women and doctors, it is not surprising if childbirth led to severe mental disorders.

(Loudon 1988: 78.)

Puerperal insanity was allied to the insanity of pregnancy and to lactational insanity, which occurred between about six weeks and a year after parturition. All three could take the form either of mania, as described by Jones, or melancholia (depression). According to Baker (1902: 16) the manic woman was more likely to attack her husband than her child. Melancholic women, on the other hand, were prone to kill *their children* out of "*morbid and mistaken maternal solicitude*; rarely do they deny the act, but excuse themselves on the plea that the child is happy in Heaven."

Lactational insanity was an "exhaustion psychosis" (Hopwood 1927) attributed to the effects of prolonged nursing on malnourished women (Maudsley 1870: 92-3; Savage 1892; McIlroy 1928: 60). Many working-class mothers were seriously malnourished and anaemic, both because of poverty and because what food their families had was consumed mainly by the men (Wohl 1983: 12-13). Some would breast-feed their infants for as long as two years (Jones 1902: 585; Davies 1978 [1915]: 110), perhaps in the hope that this would prevent conception (Baker 1902: 21; Matheson 1941: 148; Roberts 1984: 99). That this might have affected their mental health is by no means implausible (Zedner 1991: 89).

These medical explanations coexisted with a view of infanticide as an intelligible and even excusable response to poverty, desertion, and the stigma of unmarried motherhood. During the eighteenth century, the killing of newborn illegitimate children came increasingly to be seen as an intelligible response to shame, desertion and poverty, and juries became increasingly will-

ing to acquit accused mothers (Malcolmson 1977, Jackson 1994). Though a few of these mothers pleaded that they had acted in a temporary "frenzy" (Hoffer and Hull 1984: 70, 85), insanity defences do not appear to have been common in such cases, but were more frequent when married women killed their babies (McLynn 1991). Awareness of the social causes of infanticide was heightened by the controversy surrounding the Poor Law (Amendment) Acts of 1834 and 1844, which left unmarried mothers with little option but to enter the workhouse (Behlmer 1979). In 1882 a philanthropic magazine portrayed infanticide as virtually inevitable: "There are only two courses before the unfortunate mother, either to kill her child or support it by sin" (quoted by Higginbotham 1992: 260). But while some writers, like the birth control pioneer Charles Drysdale (1866, quoted by Behlmer 1982: 22) and the lawyer J.W. Jeudwine (1920: 43-5), denounced the excessive stigma attached to unmarried motherhood, the usual response was one of compassion for the individual woman.

The case of Elizabeth Lane (1895) epitomises the relationships between poverty, insanity and infanticide. Lane drowned her baby in a canal after giving birth in a workhouse. The jury rejected her counsel's suggestion that she might have left the baby near the canal in the hope that it would be found, and found her guilty of murder with a strong recommendation to mercy. The trial judge told the Home Secretary that "Elizabeth Lane appeared to be a good hard working girl - very fond of and kind to her child, but impelled by want, dread that she could not maintain it, and the heartlessness of the father, to do the act for which she now lies under sentence of death."⁷ Lane's sentence was commuted to penal servitude for life, but in 1889 she was certified insane and transferred to Broadmoor, where she died of general paralysis of the insane in 1894. Her insanity was attributed to "Adverse circumstances and Puerperal state." In the judge's letter, Lane appears as a "good ... girl" (she was 22), full of maternal tenderness yet "impelled" by her emotional response to poverty and desertion to murder her baby. The father, on the other hand, is "heartless" in his neglect of paternal duty. When Lane goes mad (ironically with the one mental illness which modern medicine attributes to biological causes directly related to sexuality), poverty is still seen as a major cause, in combination with the vulnerability brought about by

7. Lopes J to Home Secretary, 26 July 1885, in PRO HO144/155/A40379.

childbirth. Economic and biological explanations were not mutually exclusive, but worked together to portray women as vulnerable creatures easily driven to desperation by economic stress (Smith 1981: 154; Matus 1995: 198). Elizabeth Lane herself, in petitioning the Home Secretary to release her from prison, claimed that she had been "almost demented" after her mother turned her out of the house.

Although no woman was hanged for the murder of her own child aged under one year after 1849, some other murders by women, seemed too obviously rational to allow either a merciful or a medical response. These included baby farmers who adopted unwanted babies for a fee and then killed them (L.Rose 1986); Selena Wadge (1878) and Louise Masset (1899) who both killed their children in order to pursue sexual liaisons with men (Wilson 1971, Chs. 38, 52); and Elizabeth Berry (1887) and Mary Ansell (1898), who killed respectively her daughter and her sister in order to benefit from insurance policies. In such cases, male commentators were torn between suggesting that the women must be mentally abnormal,⁸ and regarding them as monstrously wicked: "a crime more deliberate, more heinous, more sordid, more wilful, more abominable in any way" than Mary Ansell's poisoning of her imbecile sister, Mercier (1900: 183) could "not remember, and [had] a difficulty in even imagining".

The case of the baby-farmer Amelia Dyer (1896) brought out this ambivalence particularly clearly. The "ogress of Reading" pleaded insanity, relying on L. Forbes Winslow's expert testimony and a history of repeated admissions to lunatic asylums (which the prosecution suggested were a means of avoiding inquiries about missing babies). She was nevertheless convicted and hanged for the murder of three babies; she was suspected of killing many more. In his study of female criminals, Harcourt Adam (1914: 189) calls her "one of the most colossal petticoated atrocities that ever blackened the fair name of womanhood", but also "derives some consolation from the conviction that she was not precisely normal, and that she had a 'kink' in her mental structure."

8. See Holmes (1908) on Masset; Whiteway (1898), Carpenter (1905: 142) and Adam (1913) on Ansell; Winslow (1910) on Ansell and Dyer.

Sane and insane infanticides, 1883-1922

Recent accounts of nineteenth century infanticide have generally recognised that medical and socio-economic explanations of the crime co-existed, and that both influenced the decisions of the courts (Smith 1981; Day 1985; Smart 1992; Matus 1995). The exact nature of this co-existence, however, is not easy to pin down. O'Donovan (1984) and Zedner (1991) describe a progressive "medicalization" of infanticide, in which medical explanations built on the pre-existing disposition towards leniency, "effectively replacing legal discourse with that of psychiatry" (Zedner 1991: 90). Judith Osborne, by contrast, suggests that "the medical rationale was never in vogue or scientifically established. It was simply more conventional, conservative and less contentious than the [real, social and economic] reasons for the courts' lenient treatment of murdering mothers" (1987: 58). Smith (1981) and Day (1985) see medical discourse as a means by which the social meaning of infanticide was displaced and neutralized; by focussing not on poverty and social stigma *per se*, but on the frail woman's insane reaction to them, psychiatry fostered a humane response but one which averted its eyes from disturbing social phenomena. I want to suggest another explanation of the co-existence of medical and socio-economic discourses by showing that, prior to the Infanticide Act 1922, each was chiefly focussed on a different group of women. The 1922 Act, however, conflated these two categories, leading to a period of confusion in the law.

To set the cases of women found insane in perspective, we need to have some idea of the overall incidence of officially suspected infanticide. Before 1922 infanticide was not a distinct crime, and women who killed their babies might be convicted of murder, manslaughter, or concealment of birth. The last of these consisted of the secret disposal of a dead baby, whether or not it had been born alive. In order to prove murder or manslaughter it had to be shown that the child had lived independently of the mother. As this was hard for the prosecution to do, and the killing of a baby during delivery constituted neither abortion nor murder, concealment of birth was often the only sustainable charge.

Prior to the reform of the criminal statistics in 1893 (see Chapter 3), murders of children aged one year or under were recorded separately in the figures of crimes known to the police and in the returns made by coroners. It is therefore possible to give the following (not necessarily

entirely accurate) statistics for infant murder and concealment of birth from 1883-1892, by which period such cases had fallen considerably below their peak of the 1860s (Sauer 1978, Behlmer 1979).

TABLE 1

MURDERS OF CHILDREN AGED ONE YEAR AND UNDER AND CONCEALMENT OF BIRTH , 30 Sept. 1882 - 29 Sept. 1892

	CORONERS' VERDICTS	KNOWN TO POLICE	APPREHENDED		FOR TRIAL	
			Male	Female	Male	female
Murder	757	736	31	242	16	199
Concealment	-	964	43	693	21	366
TOTAL	757	1700	74	935	37	565

Source: Judicial Statistics 1883-92

Some of the cases recorded as concealment would have been charged as murder, but re-classified after the courts convicted of the lesser offence (although we cannot be sure that the police consistently amended their returns as the notes to the Judicial Statistics assume).

Unfortunately the judicial statistics give no breakdown of the gender of those convicted or found insane on murder charges, or the ages of their victims. An indication of the frequency of such findings is given by Higginbotham (1992), who studied all trials of women at the Old Bailey, during every sixth year from 1839 to 1906, on charges relating to the deaths of their illegitimate children aged under five years. Of 41 women charged with murder in her sample, just two (4.9%) were found insane, while 35 (85.3%) were acquitted, although 17 of these were convicted of manslaughter or concealment. One of the 13 women charged with manslaughter, and none of the 91 charged with concealment, was found insane.

Another way of estimating the number of insanity findings in such cases is to use the statistics provided by Baker (1902) on women admitted to Broadmoor (where he was Deputy Superintendent) since its opening in 1863. It was the almost invariable policy of the Home Office

to send women found insane or unfit to plead after killing their children to Broadmoor,⁹ and Baker records 253 such admissions in this period, plus 33 attempted murder cases. Since a fair number of these women must have been among the 90 transferred to Broadmoor when it opened, we are left with about 200 women in a 38 year period, an average of about five per year, or about one in four of those committed to trial for infant murder. (The majority of these were married and therefore excluded from Higginbotham's study.) Considering that in the 1880s some 23% of all those committed for trial for murder were found insane, this does not suggest that infanticide was any more "medicalized" than other forms of murder. In fact if we take murder and concealment together, and bear in mind that infanticide had a much lower "clear up" rate than other forms of murder (cf. Gatrell 1980), it appears that an infanticidal woman was much less likely than the average murderer to be dealt with as insane.

By comparing Higginbotham's and Baker's figures we can see the major difference between the Broadmoor admissions and the general run of infanticides: the age of the victim. Of 253 cases of murder and 33 of attempted murder discussed by Baker, only 20 (7.0%) involved "newly born" babies. A further 16 cases (5.6%) occurred within three weeks of delivery and 48 (16.8%) within two months (in 13 of the cases in these two groups the victim was one of the mother's older children). 115 cases (40.2%) occurred after two months but within the period of lactation (not defined by Baker, but presumably about one year). In 76 cases (26%) the period since birth was considered to preclude the influence of lactation and Baker attributed them to "climacteric insanity" or, if the woman's age did not permit this, to some other form. The remaining 11 cases (3.6%) were attributed to the "insanity of pregnancy". In all, therefore, 215 of the cases (75.2%) involved victims over two months old (not counting the older victims of 32 multiple killers), and 202 (70.6%) occurred more than two months from the mother's last delivery. By contrast, 31 of the 42 child murder charges against unmarried mothers in Higginbotham's sample (73.8%) involved new-born babies, and so of course did all the 74 cases in which the only charge was concealment. In all (including manslaughter and attempted murder cases), 109 of Higginbotham's 132 trials (82.6%) concerned new-borns.

9. The Home Office Minutes in PRO: HO 144/680/54533 (1907), where one such woman was not sent to Broadmoor, confirm that this was an exceptional course.

The contrast between the two groups is easy to explain in both legal and medical terms. To take the legal explanation first: women accused of killing older babies could not avail themselves of the most effective defence available in neonaticide cases, namely that the child was not "born alive" in the ill-defined legal sense (Atkinson 1904, Frayling 1908). It is very difficult to know how far these defences succeeded because of real evidential weaknesses, and how far they benefited from a reluctance to convict on the part of judges and juries.¹⁰ What does seem clear is that the failure (until the Child Destruction Act 1929) to create any crime of killing a child during the process of birth showed a lack of legislative will to prosecute neonaticide effectively. From the defendant's viewpoint, a conviction for concealment of birth, normally carrying a sentence between one day's and one month's imprisonment, was clearly preferable to a finding of "guilty but insane".

The medical explanation is equally straightforward. Puerperal mania was not believed to manifest itself from the moment of delivery; according to F.J. Smith (1905: 886) it rarely occurred before the third day, and often not until the third week, after delivery. In Rehman *et al.*'s recent (1990) analysis of nineteenth-century Scottish medical records, the mean interval between delivery and the first recorded symptoms of puerperal insanity (usually mania) was found to be 16 days - very similar to present-day cases of puerperal psychosis. It was not, however, the state of mania which was deemed most dangerous for the baby but that of melancholia, which usually had a later onset. The insanity alleged to be involved in the few cases of neonaticide where it was successfully pleaded was not "true" puerperal mania but a "transient mania" or "frenzy", about which Dr Baker of Broadmoor was clearly sceptical: "It may be called transient frenzy; no doubt it is, but the mother is generally capable of afterwards detailing all the circumstances" (1902: 19).

Typical of the "transient frenzy" cases described by Baker was that of Harriet Wilson in 1893. A domestic servant, raped by her stepfather at 18, she concealed her pregnancy so as not to

10. As Higginbotham (1992: 271) points out, a large proportion of murder charges at the Old Bailey were thrown out by the grand jury or the judge. Usually these charges were brought by coroners' juries at courts where the coroners, from mixed motives of social concern and professional self-interest (Sim and Ward 1994), were keen to encourage murder verdicts on babies.

distress her mother, attributing her bloated figure to "dropsy". She gave birth in secret, but soon confessed to a friend of her mother's that she had suffocated the baby with a handkerchief and hidden him in a box. Her confession ruled out any defence of stillbirth or accident, but the local doctor suggested that she might have acted in a state of "transient delirium" - so transient that it had cleared up before he saw her. The eminent lunacy expert Bevan Lewis testified that though he had seen instances of "acute mania" they were "very rare" and there was no evidence of it in this case; but neither could he positively rule it out.¹¹ In the judge's view Wilson's "appearance was so innocent and prepossessing that it was natural for a jury to accept any theory rather than find a verdict of murder", and they found her guilty but insane. The judge asked the Home Secretary whether, as "she is in no sense a lunatic" she could be "sent to some home or refuge", which "might be the saving of her", rather than to an asylum. He was informed that she was already in Broadmoor, where "there are a number of patients who are not really insane, and who are treated by the Medical Superintendent, Dr Nicolson, with all consideration and kindness."¹² She was conditionally discharged a year and a half later, which was not especially quick: some infanticides around the turn of the century were discharged after two to four months,¹³ although others were detained until the risk of further childbearing was past.

A typical case of melancholia was that of Maria Curry (1901). She was said to be happily married, but after the birth of her son she "suffered from weakness and depression and was noticed to be in a somewhat despondent condition." One day, when he was four months old, she wrapped the child in a shawl, carried him to the London Docks, and jumped with him into the water. She was rescued but the baby drowned. She explained her action by saying "I am tired of life", but when told she would be charged with murder and attempted suicide she replied, "I did not know what I was doing. I did not intend to do such a thing as that." Dr Scott, the medical officer of Holloway, testified that she "was suffering from melancholia from puerperal causes and that she did not know the nature and quality of her act. Her mental condition had now

11. Judge's notes in PRO: HO 144/496/X42157.

12. Ibid., Bruce J to Home Secretary 14 May 1893; reply by E. Leigh Pemberton, 20 May 1893.

13. PRO: HO144/735/13524 (see especially minute dated 1 Dec. 1903); HO144/579/A63301 (1902)

improved." She was found guilty but insane.

In this case there was some evidence of insanity within the M'Naughtan Rules. In others, such as Johnson (1901), where a woman poisoned her 14-month old daughter and herself, the prisoner had clearly acted with premeditation despite her "acute melancholia", but she was none the less found insane. The verdict on Hannah Cox (1901) seems to have been based entirely on her desperate social circumstances: her husband had deserted her and her seven children, but the relieving officer would not admit her to the workhouse unless her husband came too! She drowned the two youngest children, aged five months and two and a half years. The asylum superintendent who examined her found "nothing the matter with her mind", though she had probably "yielded to a sudden impulse, which led her to form the idea that she would be doing the best she could for her children if she drowned them." Bingham J, however, "said it was clear to his mind that the prisoner had through misery lost her reason at the time she did the deed, and he thought the jury would be of the same opinion." They were, but added that they wished to censure the husband.

As Pitt-Lewis et al. (1890) and Renton (18##) pointed out, the courts in such cases were not adhering strictly to the legal definition of insanity. How unthinkable it had become by the 1880s to apply the M'Naghten Rules strictly where puerperal insanity was diagnosed is shown by the case of Elizabeth Agar, a respectable married woman who burnt her second baby to death in 1883 after killing her first child in a highly suspicious "accident". Dr Orange of Broadmoor wrote a report carefully demonstrating her legal sanity, with the clear purpose of condemning not the defendant but the law:

Taking the case of Mrs Agar, we have her own words, "I've killed my baby", so that, in one sense, she knew the nature of her act. Again, she said "Lord have mercy on me", from which it might be inferred that she knew, in a sense, that she had done wrong: and, again, we have the deposition of the Surgeon, Mr Swindale, to the effect that "she considered the child would be a bother to her"; from which it might be inferred that she had a malicious motive for killing the child.

So that, apparently, it might be quite possible, according to the law, for the poor creature to be sentenced to death, a result too horrible to be seriously contemplated.¹⁴

14. PRO HO144/129/A34007 (1884)

The "hanging judge"¹⁵ who was to try the case, Hawkins J., asked the Home Secretary to sanction a nolle prosequi, "to avoid the risk of a trial". As an alternative he suggested a free pardon, but did "not like the notion of a pardon when the semblance of a crime is absent". He was afraid that "if she was sent to Broadmoor she would go mad altogether".¹⁶ Eventually the trial was postponed sine die, and the defendant was left in the care of her husband.

Gender and Child Murder

As Day (1985) points out, there was a certain ambiguity about the diagnoses of puerperal mania and melancholia. "Puerperal" implied that they were conditions peculiar to women, yet "mania" and "melancholia" were gender-neutral categories. Day suggests that this ambiguity was directly related to the debate over irresistible impulse. Portraying the disorder as one peculiar to women appealed to the courts' existing disposition towards leniency and to deep-rooted cultural stereotypes about women's "nature". On the other hand, stressing its similarity to mania and melancholia in men enabled the courts' de facto acceptance of "irresistible impulse" in puerperal cases (Pitt-Lewis et al. 18##: ##) to serve as a precedent for its extension to other crimes. As J.F. Stephen put it in 1874: "A man loves his wife dearly, and [has] every possible motive acting in one direction, that of cherishing her to the utmost, when he suddenly starts up and lays her dead, acting from quasi-mechanical impulse. In cases of puerperal fever [sic] such conduct between mother and child is not uncommon" - and in both cases the defence of "irresistible impulse" should apply (quoted by Davies 1939). A more straightforward and plausible analogy between maternal and paternal insanity was drawn by the prison surgeon, statistician and authority on public health, W.A. Guy, who grouped all delusions prompted by "domestic anxiety" as a single category of "mania" irrespective of gender:

Of the fathers and mothers who kill their children under the pressure of domestic

15. Chadwick (1992: 317). Harris (1904: 140-1) counters this reputation by describing Hawkins' merciful attitude to infanticidal women.

16. ibid., letter from Hawkins J to Sir Vernon Harcourt, and note by Harcourt, July 1884.

anxiety culminating in an insane dread of starvation, it may be observed that they are generally remarkable for domestic virtue and devoted attachment to their victims, and that between them and ordinary murderers there is no single point of resemblance.

(Guy 1881: 224-5)

The notorious case of Gouldstone (1884), discussed in Chapter 4, suggests that Guy's argument fell on deaf ears so far as the courts were concerned. Gouldstone was reprieved by the Home Secretary (as were two other male child killers discussed in Ch. 4, Cole and Bligh) but in general, Chadwick (1992: 310) sees in the Home Office's attitude to male child murderers an example of "the Victorian law at its most severe and uncompromising. This was as true where a man's own children were concerned as those of others since the paternal duty to protect his family was a central tenet of the paradigm....The only exceptions [to hanging] were rare cases where insanity was found." Statistics seem to bear this out: from 1884 to 1892, 22 men and 23 women were sentenced to death for killing children under 12; 15 of the men and only one woman (Elizabeth Berry) were executed (Home Office 1893-4).

A closer look at those cases where insanity was pleaded, however, suggests that the Victorian law wavered a good deal. The Gouldstone and Cole cases of 1883 contrast sharply with that of Kioll in 1884 or '85. According to North (1886) who was a medical witness at the trial, Kioll killed his child with a hatchet after two or three years of violence towards his wife. North found him dull and stupid with a violent temper but no signs of insanity. Nevertheless the judge summed up in his favour and he was found insane.

John Richardson was found standing naked over the savagely beaten and bitten body of his two-year old son in 1901. He was said to be "extremely fond" of the boy and was found guilty but insane, though the nature of his supposed insanity is unclear. Francis Murphy (1898) killed his two daughters and also attacked his son and mistress because he thought he was dying of pneumonia and wanted his family to die with him. Though the prison medical officer thought him perfectly sane, Ridley J thought him "more like a wild beast" than a human being and accordingly insane; the jury agreed. In Perry (1915) the jury returned a verdict of guilty but insane without hearing the defence case, after the prosecution conceded that the "devoted father" had no motive for killing his two children. Pett (1896) was more or less a male equivalent of Maria

Curry, pushing his two children into the sea and jumping in himself under the influence of melancholia which was attributed to influenza. "A kind and affectionate husband and father, and a man of means", he too was found guilty but insane. Henry Jackson (1894) was anything but a man of means; out of work, he suffocated his six-month old baby while living in what his mother called "dreadful distress; they got rid of everything they had". His was a classic case of irresistible impulse: according to Dr Walker of Holloway, "he seemed to hear a voice, not human, telling him to do the deed, and he felt he must kill the child; and after he had done it he felt a satisfaction". But the jury accepted that in a state of "temporary insanity with homicidal impulse" brought on by diabetes, mental worry and lack of food, he did not know the nature and quality of his acts. (Despite his poverty, someone found the funds to pay Drs Maudsley and Savage to examine him for the defence.)

Steve Fielding's (1994) comprehensive catalogue of late-nineteenth century executions includes nine cases between 1883 and 1899 in which men were hanged for killing their own young children. At least four appear to have been actuated by jealousy or rage at the children's mother, whereas there seem to have been no latter-day Medeas among women murderers of the period.¹⁷ Two killed in circumstances in which women, too, were hanged: George Horton in 1889 poisoned his daughter for the sake of insurance money (compare Elizabeth Berry, among others) and Philip Matthews poisoned his daughter in 1896 to remove an obstacle to a bigamous marriage (compare Louise Masset). On the other hand, one suspects that a deserted wife might have been treated more sympathetically than the deserted husband Thomas Wyre (1888); and a woman who, like Joseph Hirst in 1896, suffocated her baby *because she was tired of it* would surely have been a candidate for a melancholia diagnosis. (The baby's mother was in fact tried with Hirst, but acquitted: Fielding 1994: 240.)

The fact, however, that the occasional defendant like Jackson was found to have been driven insane partly through poverty¹⁸ does not detract from one of Chadwick's most important insights:

17. Wilczynski (1995) found a similar difference in motivation between present-day male and female filicides.

18. Penny (1923) is another such case, though the insanity which led him to kill his daughter was attributed primarily to malaria contracted during war service.

When offered on behalf of young infanticides poverty and destitution figure high on the list of mitigating factors in both judicial letters and local petitions....The factor of poverty is totally missing from similar appeals on behalf of male homicides. It is often mentioned but only in the context of an inadequate defence due to lack of funds. One is led to conclude that to admit the impact of such elements would have been to diminish the presumed moral autonomy of an adult man in a generally unacceptable way.

(Chadwick 1992: 350)

It is, I submit, primarily in this differential response to poverty and the stress of circumstances that the major gender difference in the Victorian response to homicide is to be found, and not in the supposed "medicalization of infanticide" (O'Donovan 1984, Zedner 1991). The killing of children was explained medically either when this was the only way to translate a woman's personal and economic hardship into a legally acceptable defence, or when the killer, whether male or female, acted without a socially intelligible motive. What now has to be explained, however, is why women's infanticide was, to all appearances, thoroughly medicalized by the Infanticide Acts of 1922 and 1938.

The Infanticide Act 1922

Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of felony, to wit of infanticide, and may for such offence be dealt with as if she had been guilty of the offence of manslaughter of such child.

(Infanticide Act 1922, s. 1(1).)

In the light of earlier legal practice and medical opinion, the terms of the 1922 Act appear paradoxical. Unless the words "newly-born" were very broadly interpreted, their effect was that mental disturbance resulting from childbirth but falling short of McNaughtan insanity would constitute a defence only in cases which occurred before the first symptoms of puerperal insanity

were likely to appear, and in which mothers usually avoided murder convictions without recourse to psychiatric evidence. How did this curious piece of legislation come about?

The first proposal for a specific offence of infanticide was made by the Select Committee on Capital Punishment. The proposed offence would have been defined solely by the age of the baby - under seven days, or during birth - irrespective of the gender or mental state of the defendant. Its intention was clearly to close the gap in the law created by the "live birth" requirement and the reluctance of juries to convict neonaticides of murder. In the 1870s several proposals for a new offence were presented unsuccessfully to Parliament,¹⁹ including one drafted by J.F. Stephen who had been an important witness before the 1866 Committee. His Bill, an attempt to codify the entire law of homicide, would have confined the offence to a mother who was "deprived of the power of self-control by any disease or state of mind or body produced by bearing the child whose death is caused" (quoted by Davies 1945: 326). The inclusion of states of mind or body not amounting to disease reflected the commonsense assumptions of the time about the effect of childbirth even on healthy women. As Stephen explained to the 1866 Commission:

The operation of the criminal law presupposes in the mind of a person who is acted upon a normal state of strength, reflective power, and so on, but a woman just after child-birth is so upset, and is in such a hysterical state altogether, that it seems to me that you cannot deal with her in the same manner as if she was in a regular and proper state of health.

(ibid: 323, n.2)

After 1880, there was a gap of nearly thirty years before the infanticide issue was revived in Parliament. In this period, the salience of infanticide as a social issue declined, and the focus of concern shifted to issues of abortion, parental cruelty and neglect (Sauer 1978). It was during the passage of the Children Act 1908, a major measure to consolidate and extend child protection law (see Hendrick 1994: 121-6) that the issue re-emerged. The Lord Chancellor moved an amendment to make the death sentence discretionary when a woman was convicted of murdering her infant aged under one year, so as to avoid the "mockery" of a death sentence that would never be carried out. Lord Alverstone CJ opposed the measure, arguing that it "went too far" and

19. For details see the admirable study by D. Seaborne Davies (1937, 1945). Rose (1986: 117-8, 199 n. 16) makes good Davies' minor omissions.

that the commutation of the death sentence should be left to the Royal prerogative of mercy (Hansard (Lords) 4 Nov 1908, col. 1179). But in response to an appeal by the Bishop of Southwark, Alverstone promised to bring forward an alternative proposal. He was well qualified for this task, since in his former persona as the Conservative MP Sir Richard Webster he had taken a special interest in child protection issues. He was a key parliamentary supporter of the N.S.P.C.C., and one of the Bills he had promoted was an attempt to curb the practice of child burial insurance, which its opponents believed was an incentive to child homicide on a large scale.²⁰

Alverstone was evidently torn between his desire to deter these allegedly numerous, and largely undetected, murders, and his sympathy for women such as Mary Worley, whom he tried in 1902. Worley had left her supposed husband, by whom she had had three children, when she discovered that he was already married. Her father went to the "husband's" house and killed himself there. The next day, Mary jumped into a canal with two of her children, one of whom drowned. Her counsel suggested that "This accumulation of undeserved misery was enough to upset the reason of any ordinary human being", and she was found guilty but insane despite the absence of medical evidence. Alverstone told her "she must not feel that this cast any censure upon her at all", and to the Home Secretary he wrote: "I have the strongest possible opinion that she ought not to be undergoing any punishment at all".²¹ Yet at the other extreme, as Alverstone told the Lords when he introduced his Bill in 1909, "Deliberate murders of infants from three to six or nine months by poor women who desire to get rid of their offspring are among the worst murders," for which the death penalty must be maintained. Alverstone's contacts in the child protection movement had also influenced his view:

A most careful examination of this question has led me to the conclusion, in which I am supported by those who are working every day for the protection of human life, that the number of child murders is so great - I will not trouble the House with statistics, though they are alarming - that we ought to do nothing to in any way spread the feeling that there is to be any less punishment in cases of child

20. Behlmer (1982) 135, 158-9. On the insurance issue see Forbes (1986); Rose (1986) Chs. 15-16. Lewis (1980: 76-7) discusses the persistence of this issue up to and after the 1914-18 war.

21. PRO: HO 144/579/A63301.

murder.

(Hansard 4 May 1909, cols. 722-3.)

Although Alverstone did not clearly spell out his objections to judicial discretion in sentencing, he might reasonably have supposed that passing a nominal sentence on someone like Mary Worley in open court would spread the very feeling he was so anxious to avoid. The best solution he could devise was a Bill which would give the judges discretion to record rather than pronounce the death sentence in cases where the mother had not yet recovered from the effects of giving birth. The judges had lost this discretion in murder cases in 1861, although it remained applicable to piracy and the burning of dockyards, and amounted to a public recommendation to mercy which was invariably accepted by the Home Secretary. Both the Liberal Lord Chancellor, Lord Loreburn, and his Conservative predecessor, Lord Halsbury, criticised the Bill for undermining deterrence, though on different grounds: Loreburn because juries would still shy away from conviction, and Halsbury because it would remove the "terrors" attendant on the death sentence.²² In Committee, Lord James of Hereford proposed an amendment which would allow the judge to direct the jury that they could return a verdict of manslaughter instead of murder. Lord Alverstone accepted this, but insisted that it must be confined to cases where the mother had not recovered from giving birth, rather than allowing the judge to have "regard to all the circumstances of the case", as proposed by Lord Ashbourne.²³

The Bill fell because the government could not find time for it in the House of Commons, but the Home Secretary, Winston Churchill, shared the view that "the obligatory death penalty encouraged juries to avoid finding a a verdict of murder if it could be avoided", and "that if the law on this point were amended there would be fewer cases where the woman escapes a reasonably severe penalty."²⁴ He encouraged Alverstone to bring in another Bill based on Lord James' amendment, and discussed the wording with him, but Alverstone failed to do so. A series of

22. Ibid., cols. 724-6.

23. Ibid., cols. 957-962. Notice that Alverstone's position meant that Mary Worley's crime would still be murder.

24. Paraphrased by A. Maxwell in his historical note on the various Infanticide Bills in PRO: LCO 2/476 (1922), on which this entire paragraph is based.

private members' bills failed to reach the statute book from 1910 to 1914.

What clearly emerges from this episode is that the intention of all the main protagonists was not to treat infanticidal mothers more leniently but, on the contrary, to make it easier to punish them for something more serious than concealment of birth (see also Alverstone 1914: 286).

Arthur Henderson's Child Murder (Trials) Bill 1922 appears to have been prompted by more humanitarian sentiments. The issue was raised in parliament after a campaign in the Leicester area following the distressing scenes when a 21-year old Hinckley factory hand, Edith Roberts, was sentenced to death at the Assizes for suffocating her new-born baby in 1921.²⁵ Nevertheless, the Bill was based, at the Home Secretary's suggestion, on Churchill and Alverstone's draft bill of 1910.²⁶ It would have allowed the judge to direct the jury to consider a manslaughter verdict on a mother who killed "her infant child", if there was evidence "that she had not fully recovered from the effects of giving birth to the child". This was, in essence, what Roberts' counsel had unsuccessfully argued for at her appeal.²⁷ The Bill did not stipulate that the effects had to take the form of mental disorder (so it would cover Roberts' case where the defence relied on the mental and physical agony of giving birth unattended), or have any causal connection with the death. In order to set some limits to the exculpatory effect of non-recovery, the Home Secretary proposed substituting "newly-born" for "infant" during the Bill's committee stage in the House of Commons, but he did not press the amendment when MPs objected.²⁸

The main objection which the Lord Chancellor²⁹ and Parliamentary Counsel³⁰ had to the Bill was that it added nothing to the jury's existing power to return a verdict of manslaughter

25. Leicester Mercury, 7 and 8 June, 19 and 25 July 1921.

26. See the Home Office official Alexander Maxwell's note on the background to the Bill in PRO: LCO 2/476.

27. The C.C.A. was unsympathetic to Roberts' counsel as he had not suggested any alternative verdict to murder at the trial. Having challenged every woman called to serve on the jury, he seems to have gambled that twelve chivalrous men would acquit Roberts outright despite the strength of the evidence against her.

28. Standing Committee A: Child Murder (Trial) Bill. PP (1922) IV, 963; notes from A.J. Thring and A. Maxwell to Sir Claud Schuster, 12 April and 13 May 1922, in LCO 2/476.

29. Hansard (Lords) 16 May 1922, col. 439.

30. Note by Hugh Godley, 19 May 1922, in LCO 2/476.

when the charge was murder, and would merely create confusion in other murder cases. The idea of separate felony of infanticide was proposed by Sir Claud Schuster, the Permanent Secretary to the Lord Chancellor. "If one were allowed to express the true object of the Bill", he wrote to the Parliamentary Counsel, Hugh Godley, "I suppose one would say" - and then followed something close to the final wording of the Act - but "I suppose that this is too frank an exposition of what is intended, to commend itself." Godley suggested only minor changes, but pointed out that

There is still the difficulty about the meaning of the expression "newly born" but if the term is used I think it is better to leave it vague than to suggest a limit of time, as such limit must necessarily be arbitrarily chosen, and whatever limit is taken, say, one week, two week or three weeks, you would always get hardship in cases which fall just outside the limit.³¹

He clearly expected - wrongly as it turned out - that the judges would take a flexible approach. Schuster, however, proposed substituting a six months time limit, but was overruled by Lord Birkenhead L.C.³²

The Director of Public Prosecutions, Sir Archibald Bodkin, also had a hand in drafting the Lord Chancellor's amendments. *His comments are of great interest as they show both that, as far as he was concerned, the Bill was directed at neonaticides, and that it had little to do with the medical understanding of puerperal insanity (a disease which, in fact, is never mentioned in the Lord Chancellor's Office file on the Bill).* He gives a description of a typical case of infanticide, much like the Wilson case discussed above. In such a case, he remarks,

The phrase "balance of her mind was then disturbed" seems to me a particularly happy one; no one can doubt what it means when one visualises the scene in the bedroom - the child crying, the woman possibly very *inexperienced, a difficult* labour, the umbilical cord to be dealt with and, if I may use the homely phrase "the breakfast to be got ready as usual in the morning" ... so that she, under stress of circumstances and not being mistress of her actions, does what in cold blood

31. ibid., Hugh Godley to Schuster, 23 May 1922.

32. Schuster sent this suggestion to Lord Muir Mackenzie, who had been pressing for a more liberal Bill, on 22nd May, with the caveat that Birkenhead had not yet seen it. On 1st June Mackenzie wrote to Schuster, "As for the newly born child, I am sorry the L.C. cannot go as far as I had hoped, but I should take too much upon me if I gave any more trouble" (ibid.).

she never would have done.³³

What Bodkin thought he was drafting was not really a psychiatric defence but rather - as the academic authority Kenny (1929: 116, 125) later suggested - a defence analogous to provocation, based on a temporary loss of self-control under extreme stress. In this context, the limitation of the Act to newly-born children made sense. But when Lord Parmoor, the Bill's sponsor in the House of Lords, suggested that a clearly non-medical phrase should be used to avoid any need for expert evidence,³⁴ he was rebuffed by Birkenhead L.C.:

I am not prepared ... to say in the case of a normal healthy woman ... that the mere fact that she has gone through the ordinary physical suffering of a woman in childbirth, aggravated by such additional mental suffering as a woman who has an illegitimate child may be supposed to entertain ... constitute[s] a ground for introducing an exception to the ordinary basis of responsibility for criminal acts.

(Hansard 25 May 1922, col. 768.)

The Bill's final stage in the House of Commons was almost farcical. Col. Wedgwood, the Labour front-bencher who moved that the Lords' amendments - a complete re-writing of the original Bill - should be accepted, was completely unable to explain the purpose of those amendments, a failing cruelly exposed by the lone opponent of the amendments, the Conservative MP Sir Frederick Banbury. "A great deal of legislation", Banbury aptly observed, "is passed because honourable Members ... do not in the least know what they are doing."³⁵

Interpreting the 1922 Act

The 1922 Act fell to be interpreted by the Court of Criminal Appeal in the case of O'Donoghue (1927). The prison medical officer who testified at her trial later gave the following account of the facts. The prisoner was a domestic servant, aged 24, who gave birth in her bedroom and was then taken to hospital:

33. Ibid., Bodkin to Schuster 29 May 1922, pp. 4-5.

34. Hansard (Lords) 25 May 1922, col. 463. He suggested "by reason of the physical and mental strain her mind has thereby been disturbed".

35. Hansard 30 June 1922, col. 2488.

She remained at the hospital for eleven days, and then got daily employment in a small hotel and engaged a room. The landlady agreed to look after the baby but at the last moment disappointed her and she was obliged to go elsewhere. She then developed an abscess of the breast, and had no money or food except a tin of Swiss milk to feed the baby with. She tied a napkin around the child's neck and put the body in a cardboard box under the bed. There was nothing abnormal noticed about the girl's mental condition on reception into prison, but her physical condition was very poor. She was tried ... [for] the murder of her infant, 35 days old. I reported that she was of sound mind, both on her reception into prison and at the time of her trial.

(Morton 1934: 66)

Talbot J ruled that there was evidence of insanity to go to the jury³⁶ but none of *infanticide* as the baby was not "newly born". O'Donoghue was convicted of murder but her sentence was commuted to life imprisonment after a few days. On appeal, her counsel argued that Talbot J had been wrong to hold that an infant of 35 days was not "newly born", because "there was between insanity and sanity a degree of mental derangement called 'puerperal' which might appear physically [*sic*] for any period from two to six weeks after childbirth, to meet which condition the statute was designed" (20 Cr.App.R. at 133). A "newly born" child, it was argued, was simply a child from the effects of whose birth the mother had not recovered. But Hewart CJ pointed out that this rendered the "expression 'newly born' ... otiose and meaningless": the Act would have exactly the same meaning if they were deleted. The Court declined to define "newly born" but held that could not include "a child of more than a calendar month in age" (*ibid.* 136).

Naturally the case prompted calls for reform from the medical profession. The *JMS* (1928: 100) complained that the decision perpetuated the "solemn and almost blasphemous farce" of sentencing a woman to death with all the solemn accessories of the Black cap, etc. when everyone in court, except perhaps the unhappy victim, was well aware that there was no prospect of the death sentence being carried into effect."³⁷ Addressing the Medico-Legal Socie-

36. There was a second medical witness, Dr Finucane, of whom Talbot J said that "there are always to be found medical men ready to come forward for the defence" (quoted by Dr Finucane in discussion of McIlroy 1928).

37. It was possible, but apparently unusual, for a judge to dispense with the black cap and make it clear that the sentence was, in reality, one of imprisonment: see for example McCardie J's sentencing of an unnamed defendant in 1916, quoted in Pollock (1934: 162), and an earlier sentence by Hawkins J quoted by Harris (1904: 141).

ty, the gynaecologist A. Louise McIlroy took a different line. She accepted that O'Donoghue had been rightly convicted on the facts; quoting Lord (1927), she urged her colleagues not to confuse shame, depression and worry with mental disorder. Nevertheless, she thought that "the depressed mother, who, worn out by lactation, puts and end to her infant's life" should be absolved of murder, and suggested a six or nine month time limit in place of "newly born" (McIlroy 1928: 60).

In a letter to McIlroy (*ibid.*: 73), Lord Atkin said that O'Donoghue was "exactly the class of case our committee was thinking of" in citing infanticidal mothers to illustrate the need for an irresistible impulse defence. In contrast to Humphreys J's praise of English law's "extraordinary capacity for doing justice by perhaps illogical means" (*ibid.*: 62), Atkin thought it "a reproach to the law that it can ever be reasonable in practice only by being violated in theory". But Atkin's proposal was open to the same reproach: as the BMJ (1925) had earlier pointed out, the "impulse" felt by a mother "to put an end to her children's existence of semi-starvation" did not necessarily arise from disease, and so would not meet the conditions for the Atkin Committee's defence, yet such mothers were often found insane under the existing law.³⁸ The Lancet (1927), however, supported Atkin by pointing out that Hewart's judgment in O'Donoghue had demolished his own argument (Hewart 1927) that the Infanticide Act made the reform of the insanity defence to cover such cases superfluous.

- Humphreys J applied his own brand of illogical justice in the trial of Brenda Hale (1936) for the murder of her three-week old baby. In contrast to Mary O'Donoghue, Mrs Hale was married, comfortably-off, and had already been diagnosed as mentally ill by her doctor when she cut her baby's throat and her own (Matheson 1941: 139-40). Lord Dawson of Penn, the President of the Royal College of Physicians, testified that she was suffering from puerperal insanity. Lord Dawson said it would take "not less than three weeks, in many cases longer" for a woman to recover from the effects of giving birth, and that he would regard a baby as "newly born" up to the age of four weeks or a month. Humphreys J was clearly being invited to distinguish O'Donoghue, which in view of the explicit reference to "a calendar month" in Lord Hewart's judgment

38. Carter (1925) discusses one such case.

he surely could have done. Instead he held that he was bound to hold that the baby was not newly born, but expressed the hope that Parliament would define the term as meaning "under four weeks", and elicited from the jury a verdict that Mrs Hale was "Not Guilty of murder, but Guilty of the act charged, for which she was not responsible in law" - displaying an ingenuity in interpreting the Trial of Lunatics Act 1883 which he could not muster when it came to the Infanticide Act.³⁹

The Infanticide Act 1938

As Humphreys J had hoped, the Hale case stimulated renewed Parliamentary interest in infanticide. In 1936 a Bill was introduced by a Labour MP, Mr Jagger, which would allowed an infanticide verdict to be returned on the killing of a child up to eight years of age, if prompted by "distress and despair arising from solicitude for her child or extreme poverty or other causes." As examples of the type of case it was meant to cover, Jagger cited two women who had drowned illegitimate children whose fathers had refused to pay alimony.⁴⁰ Such a high age limit was hardly necessary: during the ten years 1927-1936, 13 mothers were sentenced to death for the murder of the children under eight years and reprieved, but none of the victims was older than 20 months (although another woman killed a daughter aged eight, just outside the proposed limit).⁴¹ The Bill lapsed as a result of the abdication crisis (Walker 1968: 132).

In 1938 Lord Dawson, the expert witness in Hale's case, introduced a Bill to extend the defence to the killing of infants aged under one year, where the balance of her mind was disturbed as a result of the birth or "the effect of lactation following upon such birth". This proposal was very nicely judged; the government (represented by the Earl of Munster) hesitated to accept

39. The 1883 Act, s. 2 (1), laid down that the verdict should be "to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid", i.e. "so as not to be responsible according to law". In view of the House of Lord's interpretation of the section in Felstead v. DPP (1914) - that the verdict was an acquittal - Humphreys J's form or words was quite defensible, and it is perhaps indicative of the judges' lack of sympathy for most insane defendants that it was not adopted more widely.

40. Hansard 24 Nov. 1936 Col. 235.

41. Hansard (Commons) 10 March 1938, col. 2093; (Lords) 22 March 1938, col. 307.

that such a long time limit was necessary,⁴² but Lord Dawson was able to bring the "united wisdom" of a committee of the Royal College of Physicians to bear: "my distinguished colleagues who know about these things in the mental world... showed me that the insanity which follows child-birth is often delayed and occurs during the period of lactation. These cases are far more numerous than even I thought myself." As he pointed out, if he had widened the Bill, as Lord Arnold proposed, to cover cases of "solicitude for the child and extreme poverty" it would have had no chance of acceptance.⁴³ As it was, the government did not oppose the Bill, and the Infanticide Act 1938 remains law to this day.

Matheson (1941), a medical officer at Holloway prison, provides some statistics on the early working of the 1938 Act. Despite a number of internal discrepancies they are the best available, as national criminal statistics were not published from 1939-45. He found that from 1935 to 1940, 36 women had been remanded to Holloway prison charged with homicide of a child under 12 months. Of the 21 women received before the Infanticide Act 1938 was in force, seven were charged with murder and not convicted of infanticide: of these two were found insane on arraignment, two guilty but insane, two were sentenced to death and reprieved⁴⁴ and one was acquitted. All 15 cases dealt with after the act were found guilty of infanticide, except one who was acquitted outright. Eleven of the victims in these 15 cases were aged under one month, two were between two and four months and two between five and six months. When it comes to mental condition, the number of cases after the 1938 Act inexplicably increases to 17; of these ten are described as having a "negative" mental history, but ten were mentally abnormal on reception. However, the great majority of women received in the period before the Act appear to have been mentally normal; indeed, assuming that the four who were "abnormal on reception" were the same four who were found insane or unfit to plead, and included the three with a positive mental history, none of those found guilty of infanticide under the 1922 Act appear to have

42. ibid. cols 305-8.

43. ibid. col. 304 (Arnold), 308-9 (Dawson).

44. One was Hilda Queree (1937), who pleaded guilty to murder on advice of counsel as her baby was five months old. The other may have been Marguriter Eastwood (1938), who killed her husband's lover's baby: Matheson does not say that all the women in his sample killed their own children.

shown any mental symptoms. Altogether 28 women were convicted of infanticide of whom 23 were bound over, three were "sentenced to a few days imprisonment and allowed to go free on [the] day of sentence" and two were certified as feeble-minded.⁴⁵ If one of the original aims of the Infanticide Act had been to punish infanticidal women more severely than they had formerly been for concealment of birth, it was clearly failing.

In terms of "medicalization" the effect of the 1938 Act was paradoxical. It gave legal effect for the first time to the medical understanding of puerperal and lactational insanity which had been ignored in drafting the 1922 Act. But its effect was to remove from the psychiatric system a number of women who would previously had been dealt with as insane. For example, one of the first beneficiaries of the Act was Jennie Dormer, convicted in November 1938. She had had difficulty in breast-feeding her baby and was extremely worried by the prospect of war, and particularly by her inability to obtain gas-masks. When the baby was ten weeks old she put it in the oven, turned on the gas, and told her husband what she had done. Dr Matheson testified that she had been insane on reception into Holloway but had since recovered. Under the old law she would almost inevitably have been sent to Broadmoor, though probably not for long. Instead she was bound over and went to stay with a friend.

Conclusion

The fundamental ambiguity about infanticide as a partial defence to murder is whether the effect of childbirth and the surrounding circumstances on the "balance of [the defendant's] mind" is to cause a loss of control under situational stress, analogous to provocation, or a mental disorder falling short of full legal insanity. That ambiguity reflects the way in which biological and socio-economic factors were combined in late nineteenth and early twentieth century understandings of infanticide. The killing of newly-born illegitimate children, or of older babies by desperately poor mothers, was to some extent a socially intelligible response to the dire circumstances in which some women were placed. But in contrast to manslaughter under provocation, which was the response of a "reasonable man", infanticide was the response of a woman who was, almost

45. The national statistics (Walker 1968: 268-9) show that of 39 women convicted infanticide from 1935-38, 12 were put on probation. I suspect that Matheson has included some of these in the "bind-over" category.

by definition, unreasonable in the immediate aftermath of childbirth. Moreover, as Lord Dawson argued in moving the 1938 Bill, some psychological aberration beyond the ordinary stress of childbirth had to be postulated to explain how a woman could overcome her maternal instinct, which "in such a case is stirred to the very depths".⁴⁶

What the 1922 Act emphatically did not represent was a triumph of medical over legal discourse. On the contrary, what is remarkable about the Act is how completely the medical understanding of infanticide - which regarded puerperal insanity specifically as a threat to older babies - was ignored. Similarly, a study of court decisions in the Victorian and Edwardian periods contradicts Zedner's (1991: 90) assessment of the "remarkable achievement" of the medical profession "in persuading lawyers of the validity of ... psychiatric exculpation, effectively replacing legal discourse with that of psychiatry." The exculpation of infanticidal women was based primarily on formal, legal grounds (the requirements of live birth and criminal intent) allied to a common-sense discourse about female frailty and economic distress; psychiatry played only a subordinate role, chiefly in atypical cases where the baby was some weeks old and the mother was usually married.

The medical profession was more successful in persuading courts to accept "irresistible impulse" as a defence in puerperal insanity cases. But although the courts were sometimes willing to extend a similar latitude to men who killed children, the attempt to use infanticide as a bridgehead for a wider reform of the insanity defence failed. Judges who shared the merciful inclinations of their juries in dealing with women were determined to limit the scope of exculpation when it came to men.

Ultimately, and belatedly, the Infanticide Act 1938 did give belated recognition to the medical view of lactational insanity, and obviated the need to stretch the insanity defence to cover such cases. Even this, however, was to some extent (as Osborne, 1987, suggests) a compromise between exponents of the traditional legal view of responsibility and those who called for explicit recognition of the effects of poverty. It was no secret that many infanticides dealt with under the 1922 Act were sane, premeditated crimes; but as Lord Darling told the Select

46. Hansard 22 March 1938, col. 309

Committee on Capital Punishment (1930, Q. 1357): "when women are concerned it does not do to be too logical".

The argument that infanticide was understood in terms of a complex interplay of biological and socio-economic factors can be extended to other kinds of female crime. Shoplifting, for example, could sometimes be explained away as kleptomania but was also understood in the inter-war period as the product of the new style of chain stores⁴⁷ which "offered inducements to theft beyond the resisting power of many of their customers" (Mullins 1948: 147) - the customers in question being, of course, women. Such aspects of the history of female crime would repay further study and might shed light on some deeply-rooted features of English criminal justice: notably its tendency to treat women as passive victims of circumstance rather than active agents, and its greater openness to social explanations of women's offending than of men's (Allen 1987, 1989).

47. The first such store, Selfridges, opened in 1909 (Lancaster 1995: 74) and was promptly criticised by magistrates for offering inducements to theft (see Abelson 1989: 277, who mistakenly gives the opening date as 1902).

CHAPTER 8

CONCLUSION

In this final chapter I shall first summarize the historical arguments of Chapters 2-7, and then offer some theoretical reflections on their significance for the sociology of forensic psychiatry, and the jurisprudence of criminal responsibility.

In Chapter 2 I argued that the changing relationship between psychiatry and criminal had to be analysed at three levels: firstly, the institutional level, concerned with the day-to-day working relationships between lawyers, administrators and medical experts and the power which they exercised over incarcerated deviants; secondly, the discursive level, concerned with the relationship between law and psychological medicine as abstract bodies of knowledge, which is inextricably tied to the relationship between the professions which are constituted by the accredited possession of such knowledge; and *thirdly the cultural level, at which those specialist discourses interact with commonsense understandings of the social world, which change as that world and its economic foundations change.* I shall summarize briefly the main developments from the 1830s to the 1940s at each of these three levels in turn.

The institutional context. The entry of the medical expert into decisions about criminal responsibility in English law can be attributed to the combination of (a) the rise of asylum psychiatry, bringing with it the mad-doctor as the legally accredited expert with unique opportunities to observe and scientifically classify the insane; and (b) the rise of the defence lawyer in a court system which depended on adversarial truth-checking *mechanisms in contrast to the inquisitorial* ones of most European states. The association between medical experts and the defence made their evidence vulnerable to accusations of partisanship, but their status improved following the centralisation of the control of prosecutions in capital cases in 1884. The brief "golden age" of medico-legal relations at the end of the nineteenth century was disrupted by the rise of the prison medical officers, who displaced the asylum superintendents from their place as the experts routinely consulted by the prosecution and drove them back into a position where they appeared to be aligned with the defence. Their opportunities for routine observation of remand prisoners,

combined with a disciplinary regime which institutionalized suspicion of malingering, produced an approach to insanity and responsibility which was more congenial to the judiciary than that of the lunacy experts, but at the same time it facilitated the emergence of new ways of classifying offenders - in terms of degrees of weak-mindedness and suitability for treatment - which subtly undermined legal definitions of responsibility.

Discourses on responsibility. Early Victorian law and medicine each defined the responsible subject in terms of the logic of its own discourse, with little reference to the other. From the legal point of view, "responsibility" meant knowing (or being presumed to know) the law and voluntarily breaking it; for medicine, it meant that one's actions were controlled by the higher centres of the brain. These apparently incompatible definitions converged, however, in a conception of a subject with sufficient rationality and self-control to understand that an act was legally prohibited and to choose whether or not to commit it. In the works of Stephen, Mercier and their contemporaries a medico-legal discourse of responsibility emerged in which law and medicine combined in a syllogistic argument: jurisprudence (the general principles of law) defined the attributes of the responsible subject; medicine defined categories of deviant who wholly or partially lacked those attributes; the conclusion was that such deviants were wholly or partially irresponsible. The practical implication was that the law should recognize some form of irresistible impulse defence and some form of diminished or mitigated responsibility in cases of impaired self-control or mental confusion. But this emerging consensus collapsed in the early twentieth century as medico-psychological discourse about crime became increasingly fragmented. Positivist criminology challenged the consensus by arguing that all true criminals - those who were criminal by nature rather than by accidental circumstances - were to some degree deficient in the attributes of the responsible subject, and that this made nonsense of the idea that punishment should reflect degrees of responsibility. Psychoanalysis challenged it by claiming that the true motives of much human conduct were unconscious, and the apparently rational and conscious choice whether to obey the law illusory in many cases. Prison medicine, meanwhile, identified categories of mentally defective and weak-minded criminals, prisoners suitable for psychological treatment and insane petty offenders, who could be allocated to penal or psychiatric control on

pragmatic grounds and with little reference to their formal responsibility.

Faced with the fragmentation of medical psychology, jurists and judges reasserted the validity of the McNaughtan rules as a purely legal definition of insanity which did not depend upon the truth of any one scientific theory. At the same time the rules were said to be sufficiently flexible in practice to allow "common sense", personified by the jury, to acquit the truly insane.

The cultural context. In the early Victorian period, as Wiener (1990) emphasizes, middle-class "common sense" supported the legal view that a strict definition of responsibility and severe and consistent punishment were essential to the deterrence of crime and the building of "character", especially among working-class men. Even in this period, however, juries brought a degree of flexibility to the definition of insanity, especially where women were concerned (Smith 1981). In practice, the Victorian system of policing and punishment had the effect of producing an increasingly visible class of recidivists who appeared immune to its deterrent and disciplinary effects. The rise of the "criminal class", together with the growing social authority of science in general, created a climate in which purportedly scientific explanations of crime could gain a serious hearing from policy-makers and jurors, although this receptiveness was always tempered by a distrust of scientific "speculation". So long as medical discourse built upon and reinforced lay understandings of the irrationality of certain crimes, it was able to influence both jury verdicts and legislation in defiance of the strict logic of the legal view of responsibility. The two major developments of 1922 both illustrated the limits of medical influence. The True case showed that even strong and unanimous medical evidence, and a liberal interpretation of the law, would not persuade a jury to excuse what appeared as a callous and brutal crime committed for financial gain. And the Infanticide Act created a partial defence which was absurd from a medical point of view but which reflected commonsense understandings (partly shared and influenced by medicine) of the biological frailty of women and the predicament of young unmarried mothers.

Psychiatry, Law and Common-sense

Zygmunt Bauman's (1992) discussion of the problematic status of sociology will provide a *framework within which to integrate the three levels of analysis summarized above and to*

highlight some of the peculiarities of forensic psychiatry. Bauman is concerned with what makes a discourse or discipline able to develop into a fully-fledged "discursive formation". A discursive formation is more than merely a systematic body of concepts; it is a system within which certain persons (or the occupants of specified institutional sites, e.g. judges and juries) can make statements of a certain kind (e.g. judgments, verdicts) about certain objects or events (e.g. contracts or crimes).¹ A discursive formation such as physics (or law) is able to define its own boundaries (the range of entities or events with which it is concerned) and the rules which determine what is a valid statement within those boundaries. Bauman points out that such formations may secure their autonomy in relation to other discourses depend in either or both of two ways: by the

explicit or tacit, respectful or grudging acceptance by other discourses of the exclusive right of the given formation to draw its own boundaries (participants of any significant discourse would agree that only certified physicists can make statements belonging to physics ...) or by rendering trespassing implausible by setting the formation outside the reach of other discourses (non-specialists would not challenge the statements of physicists for lack of access to the events which they narrate ...)

(Bauman 1992: 71-2).

Non-specialists do not, for example, have access to particle accelerators except under the guidance of physicists, whose "monopoly of ownership has been guaranteed in advance by the nature of scientific practices, without recourse to legislation and law-enforcement" (*ibid*: 72).

These characteristics of discursive formations such as physics are not shared by "quasi-formations" such as sociology, which

are bound to exist parasitically upon objects and events already construed and pre-interpreted within other social discourses.... Sociologists cannot even make a reasonable bid for the superiority, let alone exclusiveness, of their commentary over the interpretations produced incessantly by the direct "owners" of experience and by other "outside" commentators (writers, poets, journalists, politicians, religious thinkers) whose access to other people's experience is not dissimilar to that attained by the members of the sociological profession

(*ibid*: 73)

1. These features of a discursive formation (Foucault 1974) have an "obvious" quality in the case of law; what is interesting is the range of analogies and contrasts which they suggest between law and various scientific discourses. For a more elaborate discussion of law as a discursive formation see Goodrich (1987).

Now, what is intriguing about forensic psychiatry is that although it is, on the face of it, much more like sociology than like physics, it nevertheless has some of the characteristics of the latter. Psychiatry has long claimed the right to define its own boundaries (Smith 1981, Goldstein 1987), and although that claim has never been conceded in full by legal discourse (as it would have been if the Medico-Psychological Association's recommendations to the Atkin Committee, for example, had been enacted), it is partially accepted, for example in the use of the phrase "disease of the mind" in the McNaughtan rules. Legal discourse, that is, accepts the existence of a range of objects (diseases of the mind) which belong to the cognitive domain of psychiatry; but it also regards the boundaries of that domain as vague and indefinite and does not allow them to be drawn solely by psychiatry itself.² In the post-war period the law has defined "diseases of the mind", on policy grounds, to include conditions such as epilepsy and arteriosclerosis over which psychiatry claims no jurisdiction (Mackay 1995: 97-9).

Moreover, whilst forensic psychiatry clearly belongs to the family of "parasitic" discourses, dealing with events (such as murders) *which have already been constituted as socially meaningful* before it arrives on the scene, it also bases its claim to expertise on its monopoly over most of the observations which provide its subject-matter. We saw this clearly in Cockburn's speech in the McNaughtan trial (Chapter 1). Lunacy specialists and prison doctors did exercise a monopoly, or rather duopoly, over the mechanisms for observing and interviewing defendants and classifying their findings against the background of previous observations. The prison and lunatic asylum were, in a sense, the analogues of the particle accelerator - inaccessible (and hugely expensive) technologies of observation. Unlike the physicists' monopoly, however, that of psychiatry was dependent upon law, and was vulnerable to fairly subtle changes in institutional power-structures (such as the changing relationships between lunacy experts and the prosecution).

A corollary of this point is that although psychiatry has to share the fields of crime and madness with other commentators such as novelists and politicians, it can claim that its access to

2. As the philosopher Anthony Kenny puts it, "in the case of psychiatry there is a more than usual difficulty in deciding whether men of science are testifying within their science, and when they are going beyond it" (1985: 52).

relevant experiences of madness is in some respects different, and superior, to theirs. And in the pre-war period, those with the most direct access to the those experiences - the "criminally insane" themselves - were, for the most part, effectively silenced. Even when they did make their voices heard - like Stephen Penny ("Warmark"), who both gave lucid testimony in his own defence and published a memoir of his trial and detention - it was often in their own interests to accept the psychiatric view; while those who challenged that view (e.g. John Nyland; see above: 59) were easily discredited.

Finally, whilst psychiatry always had to compete with alternative narratives, typically those which interpreted conduct in more voluntaristic terms (Smith 1985), it was often able to exploit the inability of such narratives to render the relevant events intelligible. For example in the Walker case (1922; above: 115-6), the jury and most of the public were probably unfamiliar with narratives of homosexual sadism within which his actions could have been interpreted as voluntary and rationally self-gratifying (Fairfield 1922: 194).

Because of its intermediate position between the fully autonomous and wholly parasitic discourses, psychiatry has two very different strategies available to it in attempting to win recognition from other discourses such as law. One is the strategy of "scientism": psychiatry (and those who rely on it, including defence lawyers) may stress its affinity with the natural sciences, its esoteric vocabulary and its access to information beyond the grasp of the laity. For example both Scull (1993: 296-7), describing early 19th-century England, and Menzies (1989: 169-71) in a study of Canadian psychiatric reports of the late 1970s, point to the value of arcane nosologies in virtually blinding the lawyers and laity with science. The danger of this approach is that psychiatry will appear incomprehensible and dangerous to the representatives of other powerful discourses, while also drawing attention the gap between its own cognitive claims and those of more established sciences (Oppenheim 1991). The alternative strategy is that of "permeation" (Clark 1982) which stresses the affinities between psychiatric and "common sense" or legal understandings of, for example, women and epileptics. Thus, since it was "obvious" to lawyers and the laity that "irresistible impulses" occurred in epileptics and some women, the psychiatric notions of irresistible impulse and "masked epilepsy" could be presented as nothing more than an extension of concepts which were already recognized, and a way of filling in the gaps in a

common-sense understanding of the world.³

In the period covered by the present study, the strategy of permeation was generally more effective than that of scientism. Judges and juries were not easily impressed by elaborate theories and "speculations", but in a high proportion of murder cases juries or the Home Office were willing to accept psychiatric explanations of crimes that did not appear straightforwardly rational and wicked. The scientific "weakness" of late nineteenth-century psychiatry, and later of the pragmatic, eclectic approach of Norwood East, may even have been in some respects a strength when it came to influencing courts policy-makers. As Castel argues in respect of an earlier period, it was perhaps just "because it did not achieve autonomy as regards a specifically 'scientific' dimension that mental health medicine was able to become a reality in its practical objectives" (1989: 103). Conversely, the ostensibly more rigorous discourse of psychoanalysis was an almost total failure in the forensic field, except when so diluted as to be almost unrecognisable.

Since 1940, however, the position of psychiatry has been altered by the emergence of technologies offering observations of events in the brain entirely beyond the boundaries of lay cognition. In the Lees-Smith case of 1943, two psychiatrists were able to persuade a jury to acquit the matricidal defendant in defiance of the McNaughtan rules by demonstrating his abnormal "brain-wave" readings. In the longer term, however, the effect of EEG (electroencephalograph) evidence has been to remove epilepsy from the domain of psychiatry to that of neurology and undermine the diagnoses of "affective epilepsy" etc. which were previously standard non-explanations of "motiveless" conduct. The definition of epileptic automatism, the paradigm case of insanity for nineteenth-century psychiatry, as a "disease of the mind" now appears anomalous from a medical standpoint (Fenwick and Fenwick 1985). More recently, the emergence of neuroimaging techniques based on the detection of subatomic particles in the brain has given some aspects of neuro-psychiatry a technologically based autonomy precisely analogous to that of physics. The privileged access of neurologists and neuropsychiatrists to these high-technology observations could be used to mount a new challenge to legal conceptions of

3. A study of the long-term detention of those found insane or unfit to plead similarly suggests that "common sense" perceptions of dangerousness, rather than esoteric psychiatric concepts, form the basis for a working consensus amongst psychiatrists, Home Office officials and Tribunals (Mackay and Ward 1993).

responsibility (see Fenwick 1993), but one which will certainly be resisted on the basis that the data obtained is irrelevant to the legal and moral issues at stake (Buchanan 1994).

Responsibility

Those legal issues continue to revolve around the McNaughtan rules formulated in 1843. The resilience of those rules, despite all the criticisms that have been made of them in the name of science, doubtless owes something to the fact they have a rather cogent jurisprudential basis. That basis assumes that the main function of criminal laws is to discourage certain actions by warning people that if they are proved to have committed those actions they will be liable to a coercive sanction. Those who, having been given fair warning of the sanction, intentionally commit the prohibited act, may fairly be punished. Those who either have not had fair warning, because they are so mentally disabled that they cannot be expected to understand the law's threats, or have not intentionally committed the prohibited act, because they could not correctly perceive the nature of the act or its relation to the legal norm, cannot fairly be punished. That argument remains as persuasive today as it was in 1843 (see for example Dennett 1984). It is open to the same fundamental criticism which Norrie (1993) and other critical scholars level against the entire body of doctrine of which it is a part: that in focussing on one narrow aspect of fairness it legitimizes practices of punishment which are in other respects thoroughly unfair, by defining as irrelevant numerous social and emotional factors which impinge on the "freedom" of offenders. More orthodox criticisms usually involve some variant of Stephen's (1883, II: 171-2) point that such a narrow test puts the law "out of harmony with morals" so that legal responsibility is divorced from "moral infamy". But attempts to extend the test (on the lines of the American Legal Institute's Model Penal Code) to those who know they are breaking the law but cannot help doing so have always fallen foul of the same objection that Stephen had to contend with: that there is no conceivable way of distinguishing between an "irresistible impulse" and one that is merely unresisted (see Mackay 1995: 111-6 for a review of the U.S. debate).

If the McNaughtan rules are and were so cogent, why had they become by the 1920's a law which in Lord Atkin's words could "ever be reasonable in practice only by being violated in theory"? The answer is simple: the law of murder confused a necessary condition for punishment

- that the accused could fairly be convicted of a crime - with a sufficient condition for a specific punishment, the death penalty. Death being the mandatory sentence for murder, the law was "violated in theory" by juries (and the principles which supposedly determined whether prisoners were fit to be hanged were stretched by Home Secretaries) to avoid hanging people who were not thought to deserve it. Even Lord Atkin and his Committee, who saw that responsibility and punishment were different questions, could suggest no way out of the difficulty, except to tamper with the McNaughtan rules and leave Home Secretaries to exercise their discretion in a way that had no clear justification in principle.

Underlying this impasse was one of the fundamental sources of conflict between law and psychiatry. Legal discourse centres on a binary classification of acts according to rules: an act is either lawful or unlawful, a defendant is either responsible for it or not. "Disciplinary" discourses such as psychiatry centre on the gradation of individuals according to norms; being impulsive or neurotic or feeble-minded is a question of degree. Long before Foucault (1977) pointed out this contrast, jurists like Hume Williams (1890) and Oppenheimer (1909) recognized it as a major obstacle to harmonious medico-legal relations. The crucial change which occurred between the time of McNaughtan and the time of Stephen's History was that the commonsense morality of the classes from which jurors and Home Office officials were drawn shifted from the legalistic all-or-nothing view of responsibility towards the medical one, at least to the extent of accepting that much criminal conduct was a product of weakness rather than wickedness, and its moral culpability was matter of degree (Wiener 1990).

In most areas of sentencing, the tension between the binary nature of criminal liability and the graduated nature of perceived moral culpability could be resolved by the device of mitigation (Norrie 1993: 46). Imprisonment, being quantifiable, lent itself readily to this compromise. The death penalty, however, was not susceptible to such fine gradations. The idea that it might depend on degrees of culpability assessed at the discretion of the judge was perceived, as the debate over infanticide illustrates, as a fundamental threat to its legitimacy, although the prerogative of mercy (by definition an act of grace which the condemned had no right to expect) provided a necessary safety-valve.

The alternative to mitigation or executive discretion was an intermediate verdict, either

along the lines proposed by Stephen (1883) - "guilty but his power of self-control was diminished by disease" - or conviction of a lesser offence, i.e. manslaughter or infanticide. For Stephen, this was the only way to preserve the effectiveness and legitimacy of the death penalty as an expression or of moral censure. It is a fascinating question, but beyond the scope of this thesis, why the "diminished responsibility" solution found favour in Scotland so much earlier than it did in England (Walker 1968, Ch, 8; Lownie 1989). What is clear from the debates over infanticide is that senior members of the judiciary such as Alverstone CJ and Halsbury LC were very hesitant about any formal relaxation of the law of murder even for a category of offenders who were never in practice executed. What these debates also show is that if a lesser offence was going to be created it could not easily be confined to those who had a recognized psychiatric illness; in fact the semi-defence of infanticide in its original form was based much more on considerations of economic privation and emotional trauma than on any medical theory.

In some respects the Infanticide Acts, and the nominal sentences normally passed for offences against them, anticipate principles that are still considered radical in the 1990s:

that in cases of low culpability - a notion which should have much wider application than a narrowly conceived insanity or diminished responsibility defence and should include addiction, economic privation, emotional or social trauma - rehabilitation should be the primary objective and punishment should be kept to a minimum. In cases of trivial offences or improbability of further offending, positive rehabilitation would normally be unnecessary, and minimal punishment would [be appropriate].

(Hudson 1993: 167.)

As Garland (1985: 192) points out, "special cases" can provide precedents for much wider transformations of penalty; and the special case of infanticide provides a remarkable precedent for the approach to "low culpability" cases for which Hudson (persuasively, in my view) is arguing. Its restriction to a narrow category of offences which can be committed only by women is surely an indefensible anomaly; and it is also very questionable whether all cases of infanticide are crimes of low culpability (Morris and Wilczynski 1993).

In the 1950s it was at last recognized that the mandatory death penalty for murder could not be maintained. The Royal Commission on Capital Punishment (1953) concluded that if capital punishment were retained, the decision whether a murder merited the death penalty

should be left to the discretion of the jury; the majority also thought that the only viable alternative to the McNaughtan rules was to leave the jury an untrammelled decision "whether at the time of the act the accused was suffering from mental illness (or mental deficiency) to such a degree that he ought not to be held responsible" (1953: 116). Rather than enact the Commission's recommendations the government pushed through a compromise measure, the Homicide Act 1957. The distinction it drew between capital and non-capital murders proved to be unworkable and capital punishment for murder was abolished in 1965. One element of the 1957 compromise which survived was the defence of diminished responsibility.

In 1959 the Mental Health Act extended to all forms of mental disorder the principle which had been applied to the mentally defective (now re-labelled subnormal) in 1913: that they should be held criminally responsible but sent to hospital rather than prison. The combination of the diminished responsibility verdict and the hospital order might seem to have solved once and for all the impasse of the 1920s, by recognising degrees of culpability and by separating the question of responsibility from that of punishment or treatment. But as the leading case on sentencing for diminished responsibility manslaughter, *Birch* (1990), shows, the courts still find it necessary to classify crimes as acts either of "illness", to be dealt with by a hospital order without regard to proportionality, or "wickedness", to be punished with imprisonment.

As Walkowitz (1992: 238-9) argues with reference to the "Yorkshire Ripper" case (in which she finds striking parallels with late-Victorian murders) many contributors to the important feminist debate about male violence similarly remain "entrapped in the dichotomous thinking employed by medical and legal authorities". If history has anything to teach us about the problem of criminal responsibility, it is that we should be looking for ways to escape such dichotomies; to recognize that many perpetrators of violence may be desperately confused, distressed and in need of help, while still remaining moral agents who may be appropriately be called to account for their actions.⁴

4. Recent contributions to the punishment/treatment debate which seem to me to point in the right direction include Carson (1990), Shapland (1991), and Pitch (1995).

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